Calendar No. 321

102D CONGRESS *1st Session*	SENATE	REPORT 102-215

PRODUCT LIABILITY FAIRNESS ACT

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

TOGETHER WITH

ADDITIONAL AND MINORITY VIEWS

ON

S. 640

NOVEMBER 14 (legislative day, NOVEMBER 13), 1991.—Ordered to be printed

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PRODUCT LIABILITY FAIRNESS ACT

NOVEMBER 14 (legislative day, NOVEMBER 13), 1991.—Ordered to be printed

Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 640]

together with

ADDITIONAL AND MINORITY VIEWS

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 640) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF BILL

The bill, S. 640, as reported, creates certain standards of product liability law that are to be applied uniformly throughout the United States.

The present system in the United States for resolving product liability disputes and compensating those injured by defective products is costly, slow, inequitable, and unpredictable. It does not benefit manufacturers, product sellers, or injured persons. The system's high transaction costs, which exceed the compensation paid to victims, are passed on to consumers; moreover, the unpredictability, uncertainties, inefficiences, and costs of the present system have stifled innovation and have handicapped American firms as they compete in the global economy.

S. 640, as reported, addresses these problems by making a number of changes in product liability law that are applicable in all product liability actions in State and Federal courts. These bal-

anced, limited changes are intended to reduce transaction costs, provide greater certainty as to the rights and responsibilities of all of those involved in product liability disputes, encourage innovation, and increase the competitiveness of U.S. firms.

BACKGROUND AND NEED[a]

INTRODUCTION

Traditionally, product liability has been a matter left to State law, but today the morass of product liability law is a problem of national concern that requires congressional action. The system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable.a

Many consumers who are injured by defective products and deserve compensation are unable to recover damages or must wait years for recovery. They are caught up with manufacturers and product sellers in a product liability litigation system in which identical cases can produce startlingly different results. Moreover, injured victims with the severest injuries tend to receive far less than their actual economic losses, while those with minor injuries are overcompensated.

The inefficiency and unpredictability of the product liability system have made it difficult for manufacturers of products, such as machine tools, medical devices, or vaccines, to buy adequate insurance coverage. This unpredictable patchwork of State laws has had a chilling effect on the introduction of new products to market. Moreover, the current U.S. product liability system has hurt our competitive position in world markets because the excessive costs of the system result in higher prices for American products. Department of Commerce Secretary Mosbacher testified before the Consumer Subcommittee during the 101st and 102d Congresses, stating that enactment of a Federal product liability law will enhance American competitiveness in world markets.

Thus, the present system has an adverse impact on plaintiffs and defendants, manufacturers, product sellers, and consumers. The individual States cannot fully address the problems of the product liability system. Reform at the Federal level is urgently needed.

I. The Present Product Liability System Is Costly, Slow, Inequitable and Unpredictable

The present product liability system does not meet its objective of fairly compensating, in a timely fashion, those who are injured by products. It has been faulted for failing to provide an efficient and equitable means of resolving claims about defective products, but rather pushing parties to pursue costly, time-consuming litigation.

A. Costs of the Product Liability System

The costs of the product liability system have increased substantially in recent years. According to the editors of "The Liability Maze," a 1991 book published by the Brookings Institution, "Re-

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[a] The footnotes in this report may be found at the end of the majority views.

gardless of the trends in tort verdicts, most studies in this area have concluded that, after adjusting for inflation and population, liability costs have risen dramatically in the last thirty years, and most especially in the last decade." [1] Increases in awards in such cases have been much higher than corresponding increases in wages and inflation.[2] Increased product liability costs are reflected in dramatic increases in liability insurance costs. Over the last 40 years, general liability insurance costs have increased at over 4 times the rate of growth of the national economy.[3] Much of this is attributed to "high stakes" litigation which includes "traditional" forms of product liability.[4] The present product liability system's transaction costs--the costs of litigation, court costs, and attorney's fees--are enormous. Today, plaintiff and defense lawyers collect almost as much from the system as injured persons do; most of the money paid out by manufacturers never reaches the injured persons.[5] A recent survey of the membership of The National Machine Tool Builders Association stated that, for 79 closed claims settled and litigated in 1989, $2,600,000 was paid out, but only $400,000 (17 percent) went directly to claimants and $1.5 million in subrogation paid to employers and/or their workers' compensation carriers, regardless of employer fault or the lack thereof.[6]

The overall magnitude of these costs continues to grow because of what some have described as a "litigation explosion." [7] In 1980, 9,118 product liability suits were pending in Federal district courts.[8] By the end of 1988, the number of pending product liability cases had risen to 32,617, an increase of 257 percent in 8 years.[9]

The inefficiency of the present system has been noted often, and has been recently demonstrated in a General Accounting Office (GAO) report on product liability actions in five States. According to the GAO report, jury awards for all damages combined ranged from $255 to $10 million; the average jury award was $845,000 and the median $157,000.[10] The average award for compensatory damages alone was $906,000, and the median was $375,000.[11] Punitive damages were awarded in an average amount of $1,300,000, with a median of $400,000.[12] Plaintiffs' attorneys' fees average about 35 percent of the money recovered by the client, with actual figures ranging from a low of $1,000 (for a $3,000 recovery) to a high of $3,400,000 (for a $6 million recovery). The average contingency fee was $115,000. Defendants, who paid their attorneys on an hourly fee basis, paid fees ranging form $1,500 to $400,000, with an average of $41,000 and a median of $20,000.[13] The average actual cost of all expenses up to the time a verdict was rendered was $168,000 per case, including attorneys' fees. GAO noted that the costs to defendants were probably underestimated due to the probability that an out-of-state defendant would be more likely to have been represented by multiple legal firms.[14] As this survey shows, the costs directly related to product liability actions are high.

Earlier studies have also pointed out the inefficiency of the present system. A 1986 Rand Institute for Civil Justice study showed that the annual overall transaction costs of the U.S. tort system exceed compensation to plaintiffs. The Rand study found that in 1985, net compensation totaled $13 to $15 billion, but the transaction costs—including plaintiffs' attorneys' fees, defense legal

fees, public expenditures, and the time of the litigants—were between $15 billion and $19 billion.[15]

The pattern that the Rand study found in the tort system as a whole is repeated in product liability cases, alone. According to calculations derived from a comprehensive 1977 survey of 24,452 closed claims conducted by the Insurance Service Office (ISO), for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.[16] Moreover, for every dollar awarded to a claimant, he or she typically paid a contingent fee of 33 cents in legal costs and therefore received about 67 cents. Thus, on this basis (adding the average defense cost to the contingent fee) one can estimate that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

Not only do these transaction costs exceed compensation, but they have risen dramatically in recent years. According to a 1986 study by economists at New York University, the tort system's administrative or transactions cost—the amount spent to adjust and litigate claims made by injured parties—has been rising rapidly since 1983.[17] This study noted:

> These increases portend trouble ahead if they are not checked. If current rates of growth continue we can expect that by 1990 we will be spending between $31 and $38 billion per year simply administering the tort system.[18]

The mounting costs from this inefficient system have exceeded the projections made in the 1986 New York University study. According to a 1989 study conducted by the insurance industry, the U.S. tort system is the most costly tort system in the free world.[19] This study estimates that the current overall cost of the U.S. tort system at a staggering $117 billion,[20] an amount almost triple the figure projected in 1986.

Liability insurance costs rise as transactions costs rise. According to a May 1986 ISO report, "The Rising Costs of General Liability Legal Defense," the total legal defense expenses incurred in 1984 in general liability cases, including product liability cases, were $2.7 billion, and the proportion of general liability costs incurred by insurers that are consumed by legal defense costs almost tripled between 1960 and 1984. A more recent study found that between 1950 and 1988, liability insurance costs increased from $1.7 billion to $75 billion, a 44-fold increase. By contrast the American Gross National Product increased tenfold during that time.[21]

During this period, as State courts expanded the scope of product liability laws and extended the situations in which product manufacturers were held strictly liable, product manufacturers have found themselves faced with enormous increases in liability insurance costs, with increases of as much as 1,500 percent in some cases.[22]

Neither plaintiffs nor defendants benefit from the rapidly increasing and excessive costs of the present system for resolving product liability disputes. S. 640 would take a number of steps to encourage resolution of these disputes in a less costly manner.

B. Delay

A second problem with the present product liability system is delay. This is particularly a concern for seriously injured victims, who are often in desperate financial straits and must wait years to be compensated while litigation drags on.

One insurance industry survey has shown that 36 percent of bodily injury losses in product liability cases are not paid until at least 4 years after the first report, and that it takes 5 years to pay the claim with the average dollar amount of loss. This study also found that "larger claims tend to take much longer to close than smaller ones." [23]

Another insurance industry study found that the victims of the severest injuries have to wait the longest. This study found that, in cases in which payment exceeded $100,000 21.6 percent of claimants waited more than 5 years for payment. Only 2.1 percent were paid less than a year after they reported their injury, and 62.6 percent took more than 3 years to be paid.[24]

More recently, the 1989 GAO report found that, in the five States studied, on average, product liability cases took 2½ years to move from filing to trial court verdict.[25] One case studied by GAO took about 9½ years to move through the court system.[26]

Such delays plague even the many product liability cases that are settled before trial. One plaintiff's attorney has explained that, even though most cases are settled, "most settlement negotiations get serious only a week or so before trial is scheduled to begin." The delay has become so ingrained in the system that "each week the [lawyer's] firm projects cash flow by estimating the settlement value of the cases set for trial the following week." [27]

Delay also can result in undercompensation of victims. Because many victims of injury—particularly those with the severest injuries—have inadequate resources to pay for their medical and rehabilitation expenses, they are forced to settle for less than their full losses in order to get some payment because they cannot afford to wait longer without compensation.[28] Studies have shown that, when rehabilitation has to be delayed, victims do not recover as fully as they do when the problem is treated promptly.[29]

S. 640 uses two approaches to eliminate delays. These are incentives for parties to participate in Alternative Dispute Resolution (ADR) and negotiated settlements.

C. Inequitable Compensation

Not only does the present product liability system generate excessive costs and delays; it is unable to fairly compensate injured victims in proportion to their losses. Numerous studies have found that the tort system grossly overpays people with small losses, while underpaying people with the most serious losses.

The 1977 ISO product liability study found that injured plaintiffs with losses between $1 and $1,000 receive, on the average, 859 percent of their losses, while those with losses of over $1 million received, on the average, 15 percent of their losses (before paying their attorneys' fees).[30] In general, the study fond, compensation exceeded economic loss when losses were below $100,000, and then

dropped dramatically below economic loss when the claimant's loss exceeded $100,000.[31]

A 1980 insurance industry study of the largest product liability claims confirmed that the most severely injured victims do not even receive full compensation for their pain and suffering. For every dollar of past and future economic loss, the tort system paid claimants $1.22, but if the standard 33-percent attorney's contingent fee is deducted, these claimants were left with only about 81 cents for every dollar of loss.[32]

Reform of the product liability system is essential to assure that those who are injured by defective products are fairly compensated in proportion to their losses.

D. Unpredictability

Consumers, manufacturers, and product sellers are caught up in a product liability litigation system that has often been characterized as a legal lottery. It is a system in which identical cases can produce startlingly different results.[33]

As Professor Jeffrey O'Connell has explained in 1986 testimony before the Committee:

> If you are badly injured in our society by a product and you go to the highly skilled lawyer in all honesty [the lawyer] cannot tell you what you will be paid, when you will be paid, or indeed if you will be paid.[34]

The present system's uncertainty is a problem for both manufacturers and consumers injured by defective products. Plaintiffs need faster, more certain recovery that fully compensates them for their real losses. Defendants need greater certainty as to the scope of their liability under the law.

The inherent uncertainty of the system has been linked by commentators to the diversity of legal standards applied in different jurisdictions and the doctrinal mixture of contract and tort law applied in product liability cases.[35] In addition, it has been linked to expanding doctrines of liability,[36] the difficulties in establishing causation and fault, as well as the difficulties in translating nonpecuniary loss (pain and suffering) into pecuniary terms.[37]

The uncertainties and unpredictability of the system affect settlements as well as judgments. Settlement negotiations are "sabotaged" [38] by the lack of clear standards. With respect to punitive damage claims, for example, uncertainties about liability standards make it difficult for manufacturers to negotiate sensibly.[39]

Greater predictability and uniformity will benefit all parties in product liability disputes. Warren W. Eginton, a sitting Federal judge who is a product liability expert, testified at the Subcommittee's February 22, 1990 hearing:

> "[T]he more uniformity can be accomplished the more quickly the litigation flow and the lighter the economic burden on all parties involved. Certainly the task of the judge and juries in understanding the problems and the rules of law to be applied to those problems will be greatly simplified by uniformity." [40]

S. 640 would attempt to reduce the unpredictability of the current system by taking steps, such as clarifying the responsibilities of product sellers, establishing uniform standards for punitive damage awards, and establishing uniform time limits for pursuing product liability claims.

II. The Present Product Liability System Places a Burden on Productivity and Commerce

The present product liability liability system extracts high transaction costs from plaintiffs, defendants, consumers, and manufacturers. Valuable resources are wasted on fueling the product liability machinery that could be used to strengthen our economy. Moreover, those transaction costs are only a small part of the enormous burden this system puts on our economy. It deprives consumers of needed products, limits job opportunities, and weakens our competitive position in world markets. In his testimony before the Consumer Subcommittee, Commerce Secretary Mosbacher cited a Baylor University study, which found that in 1988 the current liability system cost of State of Texas alone over $8 billion and 79,000 jobs.[41]

The effects of our current system on the economy were clearly demonstrated in a 1988 survey of over 2,000 CEOs, which was conducted by the Conference Board. Participating businesses indicated that their actions were affected in the following ways by our current product liability system:

Adverse Impacts Cited Based on Actual Liability Experience [42]

Type of Impact	*Percent of firms reporting action*
Closed Production Plants	8
Laid Off Workers	15
Discontinued Product Lines	36
Decided Against Introducing New Products	30
Decided Against Acquiring/Merging	17
Discontinued Product Research	21
Moved Production Offshore	4
Lost Market Share	22

Adverse Impacts Cited Based on Anticipated Liability Problems [43]

Closed Production Plants	1
Laid Off Workers	1
Discontinued Product Lines	11
Decided Against Introducing New Products	9
Decided Against Acquiring/Merging	5
Discontinued Product Research	4
Moved Production Offshore	1
Lost Market Share	

Secretary Mosbacher testified that the Conference Board results show the extent of the indirect costs of the current product liability system. These indirect costs include "useful products being discontinued, decisions not to develop new product lines or not to continue product research, and a fear to innovate." [44] This was underscored by the conclusions of the editors and three contributors to "The Liability Maze".[45] Secretary Mosbacher expressed concern that, "Rational business planning is seriously affected by the uncertainty of the system. Just as alarming, 75 percent of the CEOs

expect that the future impact of the product liability system on U.S. competitiveness will grow in significance." [46]

A. Product Innovation

Testimony was received to the effect that the current product liability system inhibits the introduction of new products in a number of ways. The expense of litigating claims diverts resources from productive efforts. Excessive management time is diverted from production to assessment of legal claims. Many U.S. companies devote far more to product liability costs than to research and development efforts. For example, The National Machine Tool Builders Association stated recently that its members spend seven times more on product liability costs than on research and development.[47]

Moreover, the current product liability system is having a "profoundly negative impact on the development of new medical technologies," according to a recent report by the American Medical Association.[48] The report concluded that:

> Innovative new products are not being developed or are being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.[49]

A good example of this problem is the diphtheria-tetanus-pertussis (DTP) vaccine. In 1984, two of the three companies manufacturing this vaccine decided to stop producing it because of product liability costs. Later that year, the Centers for Disease Control recommended that doctors stop vaccinating children over age 1 in order to conserve limited supplies of the DTP vaccine for the most vulnerable infants.[50]

The general aviation industry is another sector of the economy that has been adversely affected by the product liability system. In 1985, insurance premiums averaged $70,000 per airplane, despite the general aviation industry's best safety record in years. At the same time these costs increased, sales of new aircraft and jobs have plummeted. In 1979, more than 17,000 general aviation aircraft were sold by United States manufacturers. In 1989, such sales had dropped by over 90 percent to 1,535 airplanes. As a result, tens of thousands of workers have been laid off, and in 1990, unemployment in the industry was over 50 percent.[51]

In the general aviation industry, manufacturers of key components have decided not to put new products on the market or to discontinue sales of current products. Examples include a "head-up display" of critical flight instruments; an electronic ignition system; and shock absorbing equipment for small aircraft.[52]

Moreover, the uncertainties of the present system deter the development of new products and product improvements. One example of this problem is The Merchants Co., which decided not to sell a state-of-the-art child safety seat because of product liability concerns.[53] Another example is a computer-controlled pump that would dispense medicine for transplant patients. Even though the

pump, which was developed at the University of Texas, was approved by the Food and Drug Administration, no manufacturers chose to exercise a license to market this product.[54]

Actual product development is not the only casualty of the product liability system. As Dr. Malcolm Skolnick testified before the Consumer Subcommittee during the 101st Congress, "Scientific inquiry is stifled. Ideas in areas where litigation has occurred will not receive support for exploration and development. Producers fearful of possible suit will discourage additional investigation which can be used against them in future claims." [55]

His views are consistent with the conclusions of Dr. Louis Lasagna of Tufts University Medical School; Mr. Robert Martin of Martin, Pringle, Oliver, Wallace and Schwartz, a Wichita, KS, law firm and Prof. Murray Mackay of the University of Birmingham, England who contributed to "The Liability Maze." For example, Dr. Lasagna observed that, in the pharmaceutical industry, the magnitude and uncertainties of product liability litigation operate to discourage certain kinds of pharmaceutical research and development.[56] Companies reach the decision not to engage in research and development, he observes, after attempting to balance the future risks of marketing a new product. Such risk may result in financial devastation.[57] Robert Martin observed that, in the general aviation industry, the willingness of courts to use current designs as a yardstick against which to measure an old product or design has discouraged research and development.[58] He states further that the only innovation that the system encourages is for lawyers claiming that a product is defectively designed.[59] Professor Mackay concluded that discussions with executives and engineers point to the conclusion that strict product liability has had a negative effect on innovation.[60] Secretary Mosbacher shared a related concern: "Universities are shying away from licensing patents to small manufacturers because of their fear that, as the originators of the idea upon which a product was manufactured, they will become the 'deep pocket' if there is litigation involving the product." [61] Thus, considerable testimony was received that the uncertainty of the system is a deterrent to the research and scientific investigation necessary to develop ideas that ultimately become innovative products.

B. U.S. Competitiveness

The adverse effects of the system have carried over into international trade. American manufacturers and product sellers generally pay product liability insurance rates which are 20 to 50 times higher than those of foreign competitors.[62] This disparity is attributable in large part to the uncertainties and costs of the American tort litigation system.[63] As a result, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports its goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of a foreign competitor.[64] With respect to domestic markets, the effect of the current uncertainties in product liability law is similar. For example, ac-

cording to the National Machine Tool Builders Association, the price of imported products can be lower if imports sell only partially in the United States because product liability insurance rates for those products could be lower.[65]

It should also be noted that changes in conflict of law theory have added to the competitive disadvantage for American firms. A foreigner injured by a U.S. product overseas now may be able to sue the manufacturer in the United States and have a U.S. law applied in the case. In the past, the rule of lex loci would have required foreign law, which is less stringent than U.S. product liability law, to be applied in a given case.[66] The diminished importance of lex loci means that U.S. manufacturers may be held to a higher and more costly product liability standard in both U.S. and foreign markets than their foreign counterparts.

The Consumer Subcommittee received testimony indicating that "uncontrolled damages have serious international implication(s)." [67] The United States has been unable to get foreign countries to enter into treaties to enforce American judgments abroad because of the "contempt for our unregulated judgments." [68] American businesses which are unable to enforce simple money judgments overseas are the loser as a result.[69]

C. Product Liability and Product Safety

Opponents of Federal product liability reform believe that the product liability system promotes safety.[70] They believe that the fear of liability provides incentives for the development of safer products.[71] Based on the evidence in "The Product Liability Maze" the editors disagree. They concluded that other factors, such as safety regulation, are responsible for the promotion of safety.[72] Specific conclusions were reached by individual contributors. For example, Robert Martin found that strict product litigation does not enhance safety in general aviation.[73] Similarly, Professor John Graham of the Harvard University School of Public Health did five case studies on whether there was a relationship between motor vehicle safety and product liability law. He concluded that "The case studies provide little evidence that expanded product liability risk was necessary to achieve the safety improvements that have been made." [74] Instead, Graham concludes that vehicle safety regulation can provide a predictable and technically sound forum in which to resolve safety issues.[75]

One contributing author in "The Liability Maze" concluded that, in the chemical industry, the liability system promotes safety.[76] According to the editor of the overall study, Professor Ashford's findings that product liability promotes both safety and innovation is contrary to the findings of all the other authors contributing to the study.[77] Moreover, the study's editor questioned Professor Ashford's use of an expansive "social costs" concept in his analysis.[78] Professor Ashford responded to this testimony in a letter to Senator Hollings.[79] Further, Professor Ashford assumes that product liability costs can be "internalized" in the price of a product, even though a 50-year-old machine can be the subject of a product liability lawsuit.[80] Finally, Professor Ashford assumes that "responsibility can be reasonably allocated or apportioned among the various parties." [81] This analysis fails to consider the doctrine of joint and

several liability which allows a plaintiff to collect 100 percent of a judgment from a single defendant even if that defendant is only minimally at fault.

The present product liability system is "overburdened" with "nonproductive legal costs." [82] Supporters of product liability reform believe that the problems associated with this costly system "must be addressed at the national level in order to bring some commonsense and stability to a highly integrated national economy where products flow freely across State lines." [83] S. 640 takes a "commonsense" approach in meeting these objectives.[84]

III. The Limitations of State Efforts at Reform

In 1978, the Federal Interagency Task Force on Product Liability, after conducting an 18-month study of the problem, issued a report which suggested that a model product liability act be drafted with the idea that reforms of the system would be enacted at the Federal level if the States did not enact the model law.[85] A final version of this model law, known as the Uniform Product Liability Act (UPLA), was published on October 31, 1979.[86]

However, UPLA, which ultimately was offered as a model State law, has not been adopted in full in any State. Over 40 States have enacted specific product liability and general tort reform measures.[87] The States' efforts have been helpful and are to be encouraged; however, those efforts at State law reform have not resolved the overall problems of the product liability tort litigation system. Most State statutes are not comprehensive and fail to address all the key issues that arise in product liability litigation. Even if any individual State adopted a comprehensive product liability statute so that its own law was clear and predictable, the legal rules would still vary from State to State.

The National Governors Association (NGA) presented testimony at the Consumer Subcommittee hearing on September 12, 1991, in support of Federal product liability reform. NGA noted that States generally oppose preemption of their laws, but argued that, in the case of product liability, there are highly compelling reasons to enact a Federal product liability law that will preempt State law.[88] The Nation's Governors recognize that individual States cannot address the problems of the product liability system effectively, because reform within one State does little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured in a nationwide market. Data show that most products manufactured in a given State are consumed or used outside the State.[89] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any State in which they do business. An attempt by any one State to reform the system cannot relieve the overall burden imposed on interstate commerce.[90] NGA concluded that a Federal product liability law, with its resulting uniformity, will promote economic growth and aid the welfare and safety of our citizens by reducing unnecessary cost, delay, and confusion in our product liability laws.[91] In New York State, the Governor's Advisory Commission on Liability Insurance recently reached the same conclusion:

> Though we are stout-defenders of State prerogatives in any area where the context permits at least minimally efficient State governance, we do not believe that product liability any longer falls into that category. The interpenetration of markets, the speed of movement of goods and money, the increasing demanding test of international competition all militate against a system which subjects product makers and sellers to a patchwork of 50 different sets of liability rules. In today's commercial world, such a system, far from permitting States like New York to impose rigorous and effective standards, simply shifts the balance of governmental influence in the direction of other states with different standards, where the same type of action can often be brought against the same defendant with quite a different potential outcome. Though we feel that product liability is unique among areas of tort law in this respect, we do believe that in this single case the case for Federal intervention is compelling.[92]

The enactment of product liability reform is within Congress' power to regulate interstate commerce.[93] There are numerous examples of Federal legislation in areas where diverse State laws are deemed a burden on interstate commerce.[94] The fact that product liability law is traditionally an area of State law does not alter the fact that Federal legislation in this area, under the commerce and Supremacy Clauses, can preempt State law to relieve the enormous burden imposed by the product liability system on American commerce.[95]

The question is not about Congress' power to enact reform, but whether it should exercise this power. The Committee believes a strong case has been made that Congress must exercise its power to reform an inefficient system that is a burden to the national economy and to our global competitiveness. As the Department of Commerce has stated, problems of a national scope with international implications require federal solutions.[96] Much of existing product liability law has been fashioned by the courts.[97] However, it is the responsibility of the Congress to deal with the broad policy implications of inconsistent state product liability laws on manufacturers, product sellers, and consumers.

IV. Federal Leadership on Product Liability Reform

S. 640 is the culmination of 15 years of effort to develop a national approach to this issue.

In the mid-1970's, product liability was first recognized as a serious problem of interstate commerce which, in the view of many businesses and academic observers, had reached "crisis" proportions and required a Federal response. This recognition came as a result of an increase in product liability claims and litigation and an increase in product liability insurance premiums.

The Federal Government responded to these concerns in 1976 by creating a Federal Interagency Task Force on Product Liability to examine the product liability problem. The task force, chaired by the Secretary of the Department of Commerce, conducted an 18-month study which culminated in a series of reports confirming

the legitimacy of the business community's concerns.[98] There was substantial evidence that the cost of product liability insurance had increased dramatically in the early to mid-1970's and evidence that the number of product liability actions had increased.[99]

In 1978, the Department of Commerce formed a second Task Force on Product Liability and Accident Compensation. This new task force developed an options paper outlining what action, if any, the Federal Government should take. The paper found that "the 'hodge-podge' of rules in each of the 50 States makes it almost impossible to set [insurance] rates with any degree of confidence," and recommended that a model product liability law be drafted for implementation at the Federal or State level.[100]

In October 1985, similar concerns prompted the Attorney General to establish the Tort Policy Working Group, an interagency working group consisting of representatives of 10 agencies and the White House. This group issued the Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability. This report recommended a number of tort law reforms applicable to product liability cases. Subsequently, the administration drafted Federal product liability legislation based on the recommendations contained in this report.

During the 101st Congress, Vice President Quayle, Chairman of the President's Council on Competitiveness, established Federal product liability reform as a top legislative priority. Vice President Quayle describes the problems as a "lawyer's tax" which results in higher prices, reduced consumer choice, lost products and jobs.[101] President Bush expressed his support for such legislation in his January 31, 1990 State of the Union Address.

The administration has subsequently expressed its strong support for the reform package contained in S. 640. Commerce Secretary Mosbacher expanded on the administration's support for S. 640 in his testimony before the Consumer Subcommittee on September 12. He cited the effect of the current product liability system on the development of new products and its detrimental effect on the competitive position of domestic manufacturers. Secretary Mosbacher concluded that product liability reform is an important aspect of an overall program to enhance domestic competitiveness in world markets.[102]

Legislative History

Senator Kasten introduced S. 640 on March 13, 1991. There are 36 cosponsors of the bill, including 7 members of the Committee. On September 12, 1991, the Consumer Subcommittee held a hearing on S. 640 and the full Commerce Committee held a second day of hearings on S. 640 and S. 645, the General Aviation Accident Liability Standards Act of 1991, on September 19, 1991. On October 3, the Committee favorably reported S. 640 by a rollcall vote of 13 to 7.

Prior to this Congress, the Committee already had a long history of involvement with product liability reform and had reported three other bills on the subject, which were introduced by Senator Kasten. S. 2631 was reported by the Committee in the 97th Con-

gress (S. Rept. 97-670), and S. 44 was reported by the Committee in the 98th Congress (S. Rept. 98-476). Congress adjourned without Senate action on either of these measures.

At the beginning of the 99th Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill preempted State law to impose uniform Federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. This bill was substantially the same as S. 44, which had been reported by the Committee during the 98th Congress.

A Consumer Subcommittee hearing on S. 100 was held on March 21, 1985 (Serial No. 99-84) and the bill was reviewed by the Committee at an executive session on May 16, 1985. At that session, the motion to report the bill was defeated by an 8 to 8 vote.

Prior to the May 16, 1985 executive session, two amendments in the nature of a substitute to S. 100 had been introduced. One of these amendments (S. Amdt. No. 16) was introduced by Senator Dodd on March 19, 1985, and the other (S. Amdt. No. 100) was introduced by Senator Gorton on May 14, 1985. These amendments were complete substitutes for S. 100 that preempted certain aspects of state law and also established alternative expedited claim systems for limited recovery of damages in product liability cases. Hearings on the Dodd and Gorton amendments were held by the Consumer Subcommittee on June 18 and June 25, 1985 (Serial No. 99-177).

After these hearings, the Committee staff was instructed by the then Chairman of the Commerce Committee, Senator Danforth, to draft a proposal that combined elements of all these measures. The first draft was released for public comment on July 15, 1985. After review of the extensive comments received from the public, a second draft was released on November 20, 1985. This draft was formally introduced by Senator Danforth on December 20, 1985, as S. 1999. This bill, which was cosponsored by Senators Dodd and Nancy Kassebaum, was the subject of 2 days of hearings before the Consumer Subcommittee on February 27 and March 11, 1986.

On April 30, 1986, Senator Kasten introduced an amendment in the nature of a substitute for S. 100 (S. Amdt. No. 1814).[103] This amendment embodied recommendations for product liability reform that has been made by the administration's Tort Policy Working Group.[104]

On May 12, 1986, Senator Danforth introduced an amendment in the nature of a substitute for S. 1999 (S. Amdt. No. 1951).[105] This amendment, which was cosponsored by Senator Dodd, replaced the expedited claim system of S. 1999 with an expedited settlement system and made a number of other changes in S. 1999. On May 20, 1986, Senator Gorton introduced an amendment in the nature of a substitute to the Danforth amendment (S. Amdt. No. 1968).[106] On May 19 and 20, 1986, the Consumer Subcommittee held hearings on the Kasten amendment, the Danforth amendment, and the other product liability measures before the Committee.

On June 3, 1986, the Committee began its markup of product liability legislation. The markup draft bill was an original bill that embodied the provisions of the Danforth amendment to S. 1999. On June 12, the Committee adopted an amendment in the nature of a

substitute for the original markup draft bill. This amendment contained product liability reform provisions that had been agreed to by Senators Danforth, Gorton, and Kasten as a "core package" of product liability reforms. On June 12, 19, 24, 25 and 26, 1986, the Committee continued its consideration of this core package and added a number of other amendments before reporting S. 2760 as an original bill. S. 2760 came before the full Senate on September 17, 1986. On September 25, the Senate agreed to the motion to proceed to S. 2760 by a vote of 84 to 13. The bill was returned to the Senate Calendar, and no further action was taken.

The primary activity on Federal product liability legislation in the 100th Congress occurred in the House of Representatives. On February 18, 1987, Congressmen Bill Richardson and Thomas A. Luken introduced H.R. 1115, which was referred to the House Energy and Commerce Committee. The Subcommittee on Commerce, Consumer Protection, and Competitiveness held extensive hearings on the need for Federal product liability reform and on specific issues in the bill on May 5, May 20, June 18, July 21, August 6, October 7, and December 17, 1987. The Subcommittee met to mark up the bill on November 18, 19, and 20, and December 3 and 8, 1987. H.R. 1115 was reported by the Subcommittee, as amended, on December 8, 1987, by a vote of 11 to 3. On May 10, 12, 18, 19, and 24, June 1, 2, 8, 9, and 14, 1988, the Energy and Commerce Committee met to markup H.R. 1115, voting on June 14 to report H.R. 1115, as amended, favorably by a recorded vote of 30 to 12. H.R. 1115 then received a sequential referral to the House Committees on the Judiciary and on Education and Labor. The Education and Labor Committee held a hearing on September 27, 1988, on provisions in H.R. 1115 that affected workplace safety. The House Judiciary Committee took no action on the bill in the 100th Congress. The sequential referral ran through the end of the session, so the 100th Congress adjourned without considering H.R. 1115 on the floor of the House.

During the 101st Congress, the Committee held three hearings on S. 1400, the Product Liability Reform Act, introduced by Senator Kasten (S. Hrg. 101-743). On May 22, 1990, the Commerce Committee reported an amendment in the nature of a substitute to S. 1400 by a rollcall vote of 13 to 7 (S. Rept. 101-356). The full Senate took no action before the adjournment of the 101st Congress.

Summary of Major Provisions

A. EXPEDITED SETTLEMENTS OF CLAIMS

Either party may offer to settle after a lawsuit is commenced. If the plaintiff offers to settle but the defendant refuses and then loses subsequent litigation, the defendant would be liable for the plaintiff's attorney's fees, in addition to damages awarded to the plaintiff for his injuries. Likewise, if the defendant offers to settle but the plaintiff refuses and the judgment is for an amount less than the settlement offer, the plaintiff would be liable for the defendant's attorney's fees. The plaintiff will not be liable for the defendant's attorney's fees in excess of the amount the plaintiff receives from collateral sources, such as insurance.

Either party may offer to participate in state ADR procedures. If a party refuses unreasonably to participate in an ADR procedure, the refusing party shall be liable for the offering party's reasonable attorney's fees.

B. RESPONSIBILITY OF PRODUCT SELLERS

In any product liability action, a product seller is liable if the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of the claimant's harm. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

C. PUNITIVE DAMAGES

Punitive damages may be assessed if the claimant establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a conscious, flagrant indifference to the safety of persons who might be harmed by a product.

Punitive damages may not be imposed upon manufacturers or products sellers for harm caused by prescription and over-the-counter drugs, medical devices and aircraft, when the safety of those products has been approved by the appropriate Federal agency prior to the marketing of the product. This defense is not available, however, to any defendant who has withheld or misrepresented relevant information during the approval process. This defense also is not available when the certification was achieved as a result of a bribe or illegal payment.

D. UNIFORM TIME LIMITATIONS ON LIABILITY

A 2-year statute of limitations for filing complaints in all product liability actions is provided, which does not begin to run until the claimant discovers or should have discovered both the claimant's harm and its cause. This "discovery rule" is more favorable to claimants than the "time of injury rule" followed by some States.

If a product is a capital good, no claim may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling or leasing the product. Capital good is defined as a product used in trade or business or held for the production of income. This 25-year statute of repose for capital goods applies only when the claimant is entitled to receive work compensation benefits and if the harm alleged by the claimant is not a toxic harm.

E. WORKERS' COMPENSATION OFFSET

Damages in a product liability action shall be reduced by the amount paid to the claimant under any State or Federal worker's compensation law. An employer's right to recapture worker's compensation benefits from a product liability award is eliminated unless the employer can prove that he and other employees were in no way responsible for the employee's injuries. A manufacturer is prohibited from suing an employer for his contribution to the

product liability award, unless the employer attempts to assert his subrogation lien.

F. DEFENSE INVOLVING INTOXICATING ALCOHOL OR DRUGS

No plaintiff may recover for harm caused by a product if the claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the claimant's harm. Determination of whether a person was under the influence of alcohol shall be made pursuant to applicable State law.

G. SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

In any product liability action with more than one defendant, each defendant's liability for noneconomic damages shall be limited to the defendant's percentage of responsibility as determined by the trier of fact. This provision addresses the so-called deep-pocket problem, which could make even a minimally responsible defendant fully liable, under the doctrine of joint and several liability, for the claimant's entire damage award.

Estimated Costs

The cost impacts of the bill are summarized in the Congressional Budget Office cost estimate below, submitted in accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974. The Committee believes that this cost estimate should be viewed in the following context.

Section 305(d) of the bill would prevent, in some instances, an "employer" (or its workers' compensation insurer, if any) from pursuing a subrogation lien against a manufacturer or product seller to recover the workers' compensation benefits paid to the employer's injured worker. The term "employer" would include the Federal Government, because the bill does apply to the Federal Employees Compensation Act (FECA).

As a consequence, the Federal Government's workers' compensation program, established under FECA, would, in some instances, be prohibited from seeking to recover FECA benefits paid to a government employee injured in a product-related workplace accident. The Federal Government could, however, seek recovery of FECA payments in those instances in which it could show a claimant's harm was in no way caused by it or one of the claimant's coworkers. In addition, the Federal Government could continue to seek subrogation recoveries in workplace accidents in which no product was involved. For example, if a postal worker was injured in an automobile accident or bitten by a homeowner's dog in the course of the postal worker's delivery rounds, FECA could seek to recover the benefits paid to the injured worker from the insurer of the nongovernment vehicle or the homeowner's liability insurer.

Moreover, the loss of such FECA subrogation rights must be considered in the context of the Supreme Court's decision in *Lockheed Aircraft Corp.* v. *United States* 460 U.S. 190 (1983). In this case, the Supreme Court rules that FECA's exclusive liability provision did not bar manufacturers' indemnity claims against the Federal Government under the Federal Tort Claims Act; if the applicable State

law permits manufacturers to bring indemnity claims against employers, such claims are not barred by FECA.

Section 305(e) of the bill would limit the ability of product manufacturers and sellers who have been forced to pay damages in product liability actions to maintain an action for implied indemnity or contribution from an employer, when the injured person is entitled to workers' compensation benefits under State or Federal law. This provision would bar in those product liability actions the third-party recovery from the Federal Government permitted by the *Lockheed Aircraft* decision where no right of subrogation, contribution or implied indemnity is asserted against the manufacturer or product seller.

The Congressional Budget Office notes that this provision would result in some savings for the Federal Government, but has been unable to assess fully the extent to which such savings would offset the loss of subrogation recoveries. According to Justice Department's Civil Division, approximately 100 suits against the Federal Government by third-party product liability defendants are pending. The amount of recovery being sought has not been estimated, but it is anticipated that the savings produced by section 305(e) could be substantial and that this provision could significantly limit the liability of the Federal Government in future litigation.

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

OCTOBER 15, 1991.

Hon. ERNEST F. HOLLINGS,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 640, the Produce Liability Fairness Act, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on October 3, 1991. S. 640 could result in a small cost or savings to the Federal Government. Such costs or savings would be considered direct spending and thus subject to pay-as-you-go scoring as required under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985. However, CBO does not have sufficient information to estimate the amount of the budget impact.

S. 640 would establish a federal product liability law. It would define certain responsibilities of manufactures and product sellers and would establish an expedited procedure for settling product liability disputes. In cases where S. 640 would establish a rule of law on an issue, it would preempt state laws on product liability. The bill would set uniform standards of product seller liability and for punitive damage awards and would establish incentives for plaintiffs and defendants to avoid trial. The bill also would keep the workers' compensation system and the tort liability system somewhat separate in cases involving both work injury and product liability by restricting:

suits by an employer or its insurance carrier against a manufacturer or product seller to recoup funds paid in worker's compensation cases;

employer or insurance carrier liens against claimants' recoveries; and

recoveries by third parties against negligent employers for monies paid in product liability judgments.

S. 640 could increase certain costs to the Federal Government in its role as an employer. This would occur because the bill would restrict suits by an employer or its insurance carrier against a manufacturer or product seller to recoup funds paid in workers' compensation cases, and because it would restrict the employer or insurance carrier liens against claimants' recoveries. A Labor Department review of Federal Employees Compensation Act (FECA) claims over the past five years showed that about $10 million annually was recovered by the Federal Government through actions brought by injured federal workers against third parties. Some portion of this amount would be lost to the Federal Government, because under this bill, the government would be restricted in such recoveries. However, there is no basis for determining how much of this $10 million a year would be lost, since the Federal Government could continue to recoup funds in cases where no product was involved, and in those product liability cases where the Federal Government was not at fault. Because the recovery of such damages directly offsets FECA obligations, their loss would result in an increase in budget authority and outlays in an amount less than $10 million annually.

The bill also could result in some savings to the government, because it would limit the ability of product manufacturers and sellers who have been forced to pay damages to injured federal workers in product liability actions to sue the Federal Government as an employer. Until 1983, the Federal Government successfully argued that FECA's exclusive liability provision protected it from such actions. However, in Lockheed *Aircraft Corporation* v. *the United States*, 103 S.Ct. 1033 (1983), it was held that FECA's exclusive liability provision did not bar third-party liability defendants from pursuing indemnity actions against the United States as an employer. CBO is not able to estimate the potential savings to the Federal Government that could be realized as a result of this provision of the bill.

The provisions in S. 640 regarding workers' compensation actions would affect the budgets of state and local governments in much the same way as they affect the federal budget. However, CBO does not have sufficient information to estimate any such budget impact.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mitchell Rosenfeld, who can be reached at 226-2860, and Cory Oltman, who can be reached at 226-2820.

Sincerely,

ROBERT D. REISCHAUER,
Director.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS AFFECTED

The purpose of this product liability reform legislation, as reported, is to provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, to reduce transaction costs, and to relieve the burden imposed on interstate commerce by the present product liability litigation system. It is anticipated that it will affect the conduct of those involved in product liability disputes by making a number of significant changes in the law that are applicable to all product liability actions. This legislation does not change the jurisdiction of State or Federal courts. Thus, the number of persons covered should be consistent with current levels.

ECONOMIC IMPACT

It is anticipated that this legislation will result in substantial cost and paperwork savings to all parties affected by product liability lawsuits. First, the legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than under current law. Moreover, the provisions of this legislation will promote early settlement of product liability disputes, thus reducing the enormous costs of product liability litigation, which are ultimately passed on to the consumer. It should also foster product innovation and enhance the competitive position of U.S. product manufacturers in world markets.

PRIVACY

S. 640 will have no adverse impact on the personal privacy of the individuals or businesses affected.

PAPERWORK

S. 640 creates no new regulations and imposes no additional regulatory requirements at either State or the Federal level. Nor will the legislation change the jurisdiction of State or Federal courts.

Section-by-Section Analysis

SECTION 101—SHORT TITLE

As Reported

Section 101 states the short title of the legislation, providing that the legislation may be cited as the "Product Liability Fairness Act."

SECTION 102—DEFINITIONS

In General

Section 102 defines terms or phrases used in the bill. Whenever a defined term or phrase is used, reference should be made to the definition in section 102.

As Reported

Section 102 defines the following terms:

(1) *Claimant.*[107]—As used in the act, a "claimant" is any person who brings a product liability action and any person on whose behalf such an action is brought. If such an action is brought through or on behalf of an estate, the term includes the claimant's decedent. If a product liability action is brought through or on behalf of a minor, a claimant includes the minor's parent or guardian.

(2) *Clear and convincing evidence.*—The bill adopts the generally accepted definition of clear and convincing evidence.[108] This is a degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of allegations sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard and less proof than the beyond a reasonable doubt standard.

(3) *Collateral benefits.*—This term includes all benefits and advantages received or entitled to be received by any claimant harmed by a product, under any Federal or State law (other than through a claim for breach of an obligation or duty), or any life, health or accident insurance or salary continuation plan. The term also applies to such other benefits as disability income or replacement services insurance payments, or any benefit received or to be received as a result of participation in any pre-paid medical plan or Health Maintenance Organization.

Collateral benefits include all such benefits regardless of any right any other person has or is entitled to assert for recoupment through subrogation, trust agreement, lien, or otherwise.

(4) *Commerce.*—This definition covers the full extent of the Congress' powers to regulate and promote interstate commerce.[109]

(5) *Commercial loss.*—This term applies to economic injury, whether direct, incidental, or consequential, including property damage and damage to the product itself, incurred by persons regularly engaged in business activities consisting of providing goods and services for compensation. A civil action for commercial loss is not subject to this bill and is to be governed by applicable commercial or contract law.

(6) *Economic loss.*—This term means any pecuniary loss resulting from harm, which is allowed under State law. The essential distinction between economic and noneconomic loss is that the amount of the plaintiff's economic loss is subject to empirical measurement and confirmation. In contrast, there is no objective standard for measuring a plaintiff's pain and suffering.[110]

(7) *Exercise of reasonable care.*—The definition is based directly on section 283 of the Restatement (Second) of Torts and the accompanying comments, which refer to the "reasonable man" standard. The "reasonable man" denotes a "person exercising those qualities

of attention, knowledge, intelligence, and judgment which society requires of its members for the protection of their own interests and the interest of others." [111]

(8) *Harm.*—The bill provides that a claimant may bring a civil action for "harm" caused by a product, against the product's manufacturer or product seller. Harm is limited to injury or damage recognized under applicable State law, and does not include loss or damage caused to a product itself or commercial loss. Therefore, damage to the product itself or commercial loss is not a compensable harm under the bill.

Damage to the product itself traditionally has been left to commercial or contract law, under which a purchaser has a right of action for out-of-pocket losses relating to the value of a product.[112] In addition, indirect economic losses caused by damage to the product itself, i.e., commercial losses, are not compensable harms under the bill. Indirect economic losses include, for example, loss of profits due to an inability to use the damaged product. Under the majority case law which follows *Seely* v. *White Motor Company* [113] and the Supreme Court's decision in *East River Steamship Corp.* v. *Transamerica Delaval, Inc.*,[114] (admiralty case) recovery for such losses is left to commercial law and the Uniform Commercial Code. These losses are, in essence, contract damages and not tort damages.[115] They arise in the course of commercial dealings and can be resolved through contracts and claims based on those contracts.

Such claims for direct or indirect economic loss are not claims for "harm" caused by a product. Under the Uniform Commercial Code and other contract law, recovery is available for economic losses. It is the Committee's intent that where recovery is not allowed because of a State statute of limitations defense or other defenses to contract liability, this bill will not create an independent cause of action. For example, a claim for commercial loss could not be brought under the Product Liability Fairness Act if recovery under State contract or commercial law is barred because of the statute of limitations, contractual disclaimers or limitations of remedies. If the claim is for damage to the product itself or for commercial loss, a civil action cannot be brought under this legislation.[116]

(9) *Manufacturer.*—A manufacturer means any person [117] engaged in a business to produce, create, make, or construct any product [118] (or component part of a product) and who designs or formulates the product (or component part of the product) or has engaged another person to design or formulate the product or component part. The term does not include a person who only designs or formulates a product—such as an architect or engineer. These persons, although not liable under S. 640, may be liable under traditional tort law for failure to exercise reasonable skill and care in rendering their design services.[119]

A product seller [120] may be a "manufacturer" of the product the product seller sells or otherwise places in the stream of commerce in two situations. First, the product seller is a "manufacturer" of a product with respect to all aspects of the product that are created or affected by this product seller's own conduct in designing, or formulating and producing, creating, making, or constructing an aspect of a product made by another. Where a product seller en-

gaged in such conduct before placing the product in the stream of commerce, the product seller is responsible for the consequences of that conduct as if the product seller were a manufacturer.

For example, a company may manufacture a truck and deliver it to a product seller. Prior to selling that vehicle, the product seller may design and create what becomes a new aspect of the truck by, for example, adding a larger engine or a cabin unit. The product seller is, then, the manufacturer of the end product with respect to all aspects of the product that are affected or created by the addition, thus, the product seller is the manufacturer with respect to defects in the cabin unit itself and with respect to defects created by adding the unit to the original truck, such as lack of a warning back-up buzzer.[121] This rule fairly holds the product seller responsible for the consequences of the product seller's actions in designing and creating a new product from the original product; it is not intended to impose the manufacturer's liability on a product seller who merely cleans, paints, or reconditions the truck with parts that are designed or manufactured by someone else.

Second, a product seller is a manufacturer of a product where the product seller holds himself out as the manufacturer to the user of the product. Where a product seller attaches the product seller's own private label to a product made by another, the product seller's name and reputation become a representation of the product's quality in design and manufacture. The rule holding a product seller responsible for harms caused by products that the product seller "endorses" with the product seller's private label is uniformly followed by the States.[122]

(10) *Noneconomic loss.*—This includes loss caused by a product other than economic loss or commercial loss.

(11) *Person.*—The act uses a broad definition of the term "person," which includes individuals, corporations, companies, associations, firms, partnerships, societies, and any other entities.

(12) *Preponderance of the evidence.*—This standard of proof is that used most often in civil litigation. It is a degree of proof which leads the trier of fact to find that a fact is more probably either true or untrue.[123]

(13) *Product.*—As used in the bill, a product is any object, substance, mixture, or raw material in a gaseous, liquid, or solid state (a) which is capable of delivery itself or as an assembled whole, in a mixed or combined state or as a component part or ingredient; (b) which is produced for introduction into trade or commerce; (c) which has intrinsic economic value; and (d) which is intended for sale or lease. The term does not include human tissue, blood and organs unless specifically recognized as a product pursuant to State law.[124]

(14) *Product Seller.*—A product seller is any person engaged in business to sell, distribute, lease, prepare, blend, package, label, or otherwise place a product into the stream of commerce, or who installs, repairs, or maintains the harm-causing aspect of a product. The definition includes anyone in the chain of distribution, such as a wholesaler, distributor, or retailer.

A seller of real property is not a product seller under this bill and, therefore, tort suits against a person who sells real property will be governed by State tort or real estate law.[125]

A person who provides professional services is not a product seller where the essence of the transaction is furnishing judgment, skill, or service and the sale or use of a product is only incidental. This follows the law of the majority of States.[126] Where, for example, an engineer, pharmacist, optician, or physician provides or uses a product in connection with that person's professional services, the person is not a product seller.[127] The majority rule is that a professional is required to exercise reasonable care, prudence, and skill in rendering services. Where failure to do so results in harm, injured persons have remedies under traditional State tort law theories and do not have a claim under this bill.

If, however, a professional engages in a commercial transaction where the essence of the transaction is not the furnishing of professional skill and judgment, the professional may be a product seller. For example, a pharmacist who sells perfume or photographic film may be a product seller within the scope of the bill. In such a case, the sale rather than the exercise of professional skill is the essence of the transaction.

A product lessor is not a product seller if (1) the product lessor acts only in a financial role in the sale or distribution of the product, and (2) the product lessor has no control over the lease arrangement. Such a person, called a "financing lessor," generally has no contact with the product and does not provide advice about the product or its selection. Such a person merely provides the money to transfer the product to the lessee. The cases that have considered the issue uniformly hold that financing lessors are not product sellers.

(15) *State.*—This definition is broad and includes the District of Columbia, all the States, territories, and possessions of the United States, and any political subdivision thereof.

SECTION 103—PREEMPTION

In general

Section 103 provides that the bill governs any civil action brought against a manufacturer or product seller for harm caused by a product and that the bill supersedes State law to the extent that it establishes a rule of law applicable to recovery in such actions. When a rule of law is not established by the bill, the issue is left to applicable State law.

Present law

The law governing the liability of manufacturers of products, who routinely sell products across State lines, is presently governed by State law. The inefficiency and unpredictability of the law as it is presently administered has become a major burden on interstate commerce. The bill seeks to simplify the law and reduce the costs and unpredictability of the system.

Congress has the power under the Commerce Clause of the Constitution to enact a Federal product liability statute that preempts State law. "Any such legislation would offend neither the Tenth Amendment's recognition of state sovereignty * * * nor the Fifth Amendment's traditional notions of due process and equal protection." [128]

As reported

Section 103(a) states that this bill governs any civil action brought against a manufacturer or product seller, on any theory, for harm caused by a product. Consistent with the definition of "harm" set forth in section 102(a)(9), section 103 states that a civil action for loss or damage to the product itself or for commercial loss is not a product liability action subject to this bill, but is governed by applicable commercial or contract law. This follows traditional law, which leaves recovery for purely commercial losses to actions founded on commercial law.

Section 103(b) provides that the bill supersedes State law regarding recovery for harm caused by a product only to the extent that the bill establishes a rule of law applicable to an action for such recovery. Any issue arising in an action governed by this legislation that is not governed by a rule of law established by the legislation shall be governed by applicable State common and statutory law.[129]

As has been noted, the Commerce Clause of the Constitution [130] gives Congress the power to enact a uniform Federal product liability act.[131] The Supremacy Clause of the United States Constitution also gives Congress the power to enact a Federal law that replaces State law in the area of product liability.[132] The fact that tort law is traditionally a matter of State law does not alter this rule. Congress has enacted a number of statutes that preempt State tort law.[133]

Section 103(b) is intended to ensure that the rules set forth in the bill are uniformly applied in all product liability actions, regardless of where the harm occurred and which court hears the claim. Under the Supremacy Clause, State courts are bound to apply Federal law,[134] and it is expected that State and Federal courts with jurisdiction over product liability actions will interpret the bill in a manner consistent with the intent of Congress.

However, section 103(b) also makes it clear that where the bill does not establish a rule of law, State law will apply. Recently, a number of State legislatures have considered the question of tort liability, including product liability, and some have adopted measures dealing with this matter. It is not the Committee's intention that this legislation preempt such State legislation—or any other rule of State law—that provides for defenses, places limitations on the amount of damages that may be recovered, or covers other topics that are not addressed by a rule in this bill. For example, the bill establishes certain rules of liability for product sellers. Those rules supersede State law. With respect to other issues regarding the liability of product sellers not covered by the bill, such as contributory versus comparative fault, State law applies.

Section 103(c) lists a number of laws that are not superseded or affected by the bill. The bill does not waive or affect the defense of sovereign immunity of any state or of the United States. The legislation does not affect any provision of the Foreign Sovereign Immunities Act of 1976. Nothing in the bill shall be construed to supersede any Federal law except the Federal Employees Compensation Act.[135] The bill does not preempt State choice-of-law rules with respect to claims brought by a foreign nation or a foreign citizen.

Nor does the bill supersede any statutory or common law, including an action to abate a nuisance, that authorizes a State or person to institute an action for civil damages or civil penalties, clean-up costs, injunctions, restitution, cost recovery, punitive damages, or any other form of relief resulting from contamination or pollution of the environment, or the threat of such contamination or pollution. Such actions involve separate policy considerations and relate to acts that are different from the acts for which this bill provides rules of law. It is possible that the same event or conduct may give rise to both a product liability action governed by this bill and an action relating to contamination or pollution of the environment. The two types of actions could be alleged as separate counts in a single complaint and may or may not be alleged against the same defendant.

Section 103(d) provides that as used in this section, "environment" shall have the same meaning given to this term in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(14)).[136]

Section 103(e) requires that this bill be construed and applied after consideration of its legislative history to promote uniformity of law in the various jurisdictions.

SECTION 104—JURISDICTION OF FEDERAL COURTS

As reported

Section 104 provides that the bill does not provide any new basis for Federal Court jurisdiction. The resolution of product liability claims is left to State courts or to Federal courts that currently have jurisdiction over those claims.

Specifically, section 104 states: "The district courts of the United States shall not have jurisdiction over any civil action pursuant to this Act, based on section 1331 or 1337 of title 28, United States Code." These sections of the United States Code establish district court jurisdiction with respect to Federal questions and acts of Congress regulating commerce; it is the intent of the Committee that these sections shall not be a basis for bringing a product liability action governed by this bill in Federal court.

Civil actions governed by this bill will continue to be handled by State courts currently open to litigants and only by Federal district courts where there is currently a basis for Federal jurisdiction.[137] The bill does not affect these bases for jurisdiction and, therefore, does not expand the caseload of the federal courts.

SECTION 105—EFFECTIVE DATE

As reported

Section 105(a) provides that the bill shall be effective on the date of its enactment and shall apply to all civil actions governed by the bill commenced on or after that date, including any action in which the harm or the conduct which caused the harm occurred before the effective date. Applying the statute to all claims filed after the effective date, regardless of when the harm occurred, allows all parties and courts to know precisely what law applies in a product liability action.

Section 105(b) provides that if any provision of the bill would shorten the period during which a manufacturer or product seller would otherwise be exposed to liability, the claimant may, notwithstanding the otherwise applicable time period, bring an action without 1 year after the effective date of the legislation. This exception is intended to prevent unfair situation from arising as a result of the application of the time limitations set forth in section 304.

TITLE II

Title II of the bill establishes two schemes for expedited settlement of product liability claims in the initial stages of litigation. These schemes are based on incentives for settlement that will reduce the delays, excessive transaction costs, and uncertainties associated with such claims.

SECTION 201—EXPEDITED PRODUCT LIABILITY SETTLEMENTS

In general

Section 201 sets forth rules governing economic incentives for encouraging settlements based on Rule 68 of the Federal Rules of Civil Procedure. Either party may offer to settle. The claimant may include an offer of settlement with the complaint. The defendant may make an offer of settlement within the time permitted for responsive pleadings or 60 days after the service of the complaint. This provision provides that a party that refuses to accept an offer of settlement would be liable for the other party's reasonable legal fees if the offeree would have fared better by opting to settle. The claimant will not be liable for the defendant's attorney's fees in excess of the portion of the verdict for which a claimant may receive collateral benefits.

The purpose of this provision is to encourage settlements when a reasonable offer is made.[138] By doing this, S. 640 will alleviate some of the delay problems associated with the current product liability system.

As reported

Section 201(a) provides that a claimant may bring a civil action for damages against a person for harm caused by a product pursuant to State law, except to the extent that such law is superseded by this title. This section provides a mechanism for settlements of disputes. It does not create or eliminate causes of action or alter standards of liability under State law.

Section 201(b) provides that a claimant may, in addition to any claim for relief made pursuant to State law, include in the complaint an offer of settlement for a specific dollar amount.

Section 201(c) provides that the defendant may make an offer of settlement within 60 days after service of the claimant's complaint or within the time permitted for a responsive pleading pursuant to State law, whichever is longer. If the defendant's responsive pleading includes a motion to dismiss in accordance with applicable law, the defendant may tender payment in the amount of the settlement offer within 10 days after the court's determination regarding such motion.

Section 201(d) provides that if an offer of settlement is made pursuant to section 201 (b) or (c), the court may enter an order extending the applicable period for response upon a motion made prior to the expiration of the applicable response period. Any such motion must be accompanied by a supporting affidavit of the moving party setting forth the reasons why such extension is necessary to promote the interests of justice and recommending a schedule for discovery of evidence material to the amount of relief. The affidavit must state also that the information likely to be discovered is material and would not otherwise be available to the moving party after reasonable inquiry. Any such order granted by the court shall contain a schedule for discovery of evidence material to the issue of the appropriate amount of relief, and should not extend such period for more than 60 days. This section leaves it to the court's discretion to decide whether to grant a motion for an extension.

Section 201(e) provides that if the defendant does not accept the offer of settlement made by a claimant pursuant to Section 201(b) and a verdict is entered for an amount equal to or greater than the specific dollar amount of the offer, the court shall include the reasonable attorney's fees and costs in the judgment entered. For the purposes of this section, reasonable attorney's fees are defined in section 201(g). Such fees shall be offset against any fees owed by the claimant to the claimant's attorney by reason of the verdict. This subsection recognizes that a claimant's attorney may be paid on a contingent basis rather than on an hourly fee basis. The amount of the penalty imposed upon a defendant does not change if the claimant's attorney is paid on a contingent basis. The defendant must pay reasonable attorney's fees, as defined in section 201(g).

Section 201(e) provides that a defendant must accept the offer in a timely fashion. The defendant must respond within the time permitted pursuant to State law for a responsive pleading or, if the defendant's pleadings included a motion to dismiss, within 30 days after the court's determination regarding such motion. Failure to respond to the claimant's offer within these time limits will trigger the imposition of the sanctions described above when the judgment is entered.

Section 201(f) provides that if the claimant does not accept the defendant's offer of settlement in accordance with section 201(c) and a verdict is entered for an amount equal to or less than the specific dollar amount of the settlement offer, the court shall reduce the amount of the verdict by an amount equal to the reasonable attorney's fees, as defined in section 201(g), and costs owed by the defendant to the defendant's attorney by reason of this verdict. The amount of this reduction shall not exceed that portion of the verdict which is allocated to economic and noneconomic losses for which the claimant has received or will receive collateral benefits as defined in section 102(3).

The claimant must respond within 30 days after the date on which the offer is made. If the claimant does not respond during that time and the verdict is not favorable to the claimant as described above, then the claimant will be required to pay attorney's fees and costs pursuant to this section.

Section 201(g) provides that for the purposes of section 201, attorney's fees shall be calculated on the basis of an hourly rate which should not exceed that which is considered acceptable in the community in which the attorney practices, considering the attorney's qualifications and the complexity of the case.

SECTION 202—ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

In general

Section 202 allows either party to settle their dispute pursuant to an approved State alternative dispute resolution (ADR) procedure. This may be initiated by either party and, it may be undertaken in addition to, or in lieu of, the procedures in section 201.

If the offeree party is unwilling to participate in such a procedure, and the court determines that the refusal was unreasonable or not in good faith, the court will assess reasonable attorney's fees and costs against the offeree. A rebuttable presumption is created that the offeree's refusal to participate in the ADR procedure is unreasonable or not in good faith if a verdict is entered that favors the offeror.

A witness at the September 19, 1991 hearing testified that this provision violates an individual's right to a jury trial under the Seventh Amendment.[139] The Committee received testimony indicating that the creation of incentives to use voluntary ADR programs is a proposal that applies equally to defendants and plaintiffs and cannot be described as an antiplaintiff provision.[140] Twenty-four States have mandatory arbitration or mediation laws.[141] Under these programs, litigants are required to enter into arbitration or mediation and the decision reached in this procedure is subject to a trial de novo at the request of either party.[142] The Federal District Court for the Eastern District of Pennsylvania has held that ADR procedures that are not binding on the parties do not violate the Seventh Amendment.[143] The proposal in this section refers only to voluntary ADR programs, which parties elect to use, and it contains incentives to encourage their use.

Eighteen States with mandatory arbitration or mediation laws have financial incentives to resolve cases before trial in order to conclude the litigation.[144] There is a similar incentive to settle cases before trial in the Federal court system.[145] The use of attorneys fees as an incentive to parties to accept an arbitrator's decision in the Washington State ADR system has been upheld as consistent with the State's constitutional provision on jury trials, which is similar to the Seventh Amendment.[146]

As reported

Section 202(a) provides that either a claimant or a defendant may offer to proceed pursuant to a voluntary ADR procedure. Such procedure must be established or recognized under either the law of the state where the civil action is brought or under the rules of the court in which such action is maintained. The offer to proceed under this section must be made within the time period established in section 201 for making a settlement offer. Except as explicitly provided in this section, it does not in any way preempt State ADR procedures. The determination of whether a party's refusal to

enter into an ADR procedure was unreasonable shall occur after a verdict is entered or the proceeding is otherwise concluded (e.g., summary judgment granted, directed verdict entered).

Section 202(b) provides that if the offeree refuses to proceed pursuant to such ADR procedures and the court determines that such refusal was unreasonable or not in good faith, the court shall assess reasonable attorney's fees and costs against the offeree. No sanctions would apply to either party in the event of a settlement.

Section 202(c) provides that a rebuttable presumption is created that a refusal by an offeree to proceed pursuant to such ADR procedure was unreasonable if a verdict is rendered in favor of the offeror.

TITLE III

This title of the bill sets forth uniform standards that govern product liability actions litigated in the courts.

SECTION 301—CIVIL ACTIONS

As reported

Section 301 provides that a person seeking to recover for harm caused by a product may bring a civil action against the product's manufacturer or the product seller pursuant to applicable state or federal law, except to the extent that such law is superseded by this bill. For the purposes of title III, this means that such civil actions will be governed by existing liability standards and rules, except to the extent that they are superseded by Federal standards.

SECTION 302—UNIFORM STANDARDS OF PRODUCT SELLER LIABILITY

In general

Section 302 specifies when a product seller other than a manufacturer [147] is responsible for harm caused by a product. A product seller is liable for harm caused (1) by its own failure to exercise reasonable care with respect to the product, or (2) by a product that fails to conform to an express warranty made by the product seller. In addition, the product seller may be liable as if it were the manufacturer if the manufacturer responsible is not subject to service of process or if the court determines that the claimant would not be able to enforce a judgment against the manufacturer.

Present law

In a majority of States, product sellers are liable for harms caused by a product as if they were manufacturers of the product.[148] Thus, product sellers may be held responsible for product-related harms that they did not cause and over which they had no control.

Two reasons have been advanced for holding product sellers liable as if they were manufacturers. First, it has been argued that the rule promotes safety and reduces the risk of harm, because product sellers will seek to avoid liability by pressuring manufacturers to make safe products.[149] This rationale, however, fails to recognize that manufacturers will feel the same, if not greater,

pressure to make safe products if they are sued directly for harms caused by their own product defects.

Second, it has been argued that the rule is fair because a product seller who is held liable for harm caused by a manufacturer's defect can seek indemnity [150] and thereby shift the cost of liability to the manufacturer who actually caused the harm.[151] Data show that, in fact, product sellers account for less than 5 percent of product liability payments [152] because generally they are successful in shifting the cost of liability to the manufacturers.

Although the end result may be fair, the system is inefficient. Product sellers are routinely sued for harms caused by a manufacturer and are forced to incur substantial legal costs both to defend the product liability lawsuit and to seek indemnification from the responsible manufacturer.[153] As courts have recognized, the product seller is not truly "held harmless" through indemnification if the product seller must "expend large sums to defend a products liability action merely because a defective product, the defect of which may be attributable solely to the manufacturer's conduct, passed through [his or her] hands." [154] Further, indemnity does not reimburse product sellers for loss of good will or reputation caused by lawsuits.

Some cases [155] and a number of State statutes [156] have recognized the inequity of the majority rule. Section 302(a)(1) is based on the case law and State statutes which provide that product sellers are responsible only for the harms caused by their own products, and claims should be brought directly against them rather than against product sellers. In the event, however, that the manufacturer responsible for the harm is not subject to service of process by the injured claimant or would be unable to pay the judgment, the product seller should be treated as if the product seller were the manufacturer. Under the circumstances, the claimant would have no recourse unless the product seller is held responsible as the manufacturer.[157]

This approach eliminates unnecessary and burdensome legal costs [158] and provides incentives for product safety without affecting a claimant's ability to recover for harms caused by a product defect.

As reported

Section 302(a) identifies two situations in which a product seller other than a manufacturer is liable for harm caused by a product. Both follow the rule that a product seller is responsible for the consequences of the product seller's own conduct. This concept of individual responsibility, of placing responsibility on the party that actually caused and could have prevented the harm, encourages product safety on the part of product sellers.

First, a claimant will recover from a product seller if: the individual product unit that caused the harm was sold or otherwise placed in the stream of commerce by the product seller; the product seller failed to exercise reasonable care with respect to the product; and the failure to exercise reasonable care was a proximate cause of the claimant's harm. Second, a claimant will recover from a product seller if the product seller made an express warranty about the product, independent of any express warranty made

by the manufacturer; the product failed to conform to the warranty; and the failure to conform to the warranty caused the claimant's harm.

Section 302(b) sets forth factors that may be relevant in determining whether the product seller failed to exercise reasonable prudence with respect to the product. The trier of fact may consider, among other factors, the effect of the seller's conduct with respect to the construction, inspection, or condition of the product and any failure of the product seller to pass on adequate warnings or instructions about the dangers and proper use of the product. The product seller is not liable for failure to warn if it provided to the person who took possession and control of the product any written warnings or instructions it had received up to that time, and made reasonable efforts to provide users with those warnings and instructions it received after the product left its possession and control. Nor shall the seller be liable, except for breach of express warranty, if there was no reasonable opportunity to inspect the product in a manner that would have or, in the exercise of reasonable care, should have revealed the product's danger. For example, a seller may not have had a reasonable opportunity to discover a product defect if the product was prepackaged [159] or if the product never passed through the seller's hands (e.g., a person may have held title to a product but may never have had possession of it).[160]

Section 302(c) provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer if (1) the manufacturer is not subject to service of process under the laws of any State in which the action might have been brought by the claimant, or (2) the court determines that the claimant would be unable to enforce a judgment against the manufacturer. For example, a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of the two provisions applies, and if the claimant proves that the manufacturer would have been liable under State law. Although section 302(c) departs from the notion of individual responsibility for harms, it ensures that a claimant can recover from the product seller if he or she is unable to recover from the manufacturer responsible for the harms.

Section 302 will encourage safety by placing responsibility on the party who caused and could have prevented the harm. It will reduce the unnecessary costs and inefficiencies associated with the current system.[161] Sellers will no longer be exposed routinely to liability for harms caused by manufacturers. The legal costs of defending product liability claims and seeking indemnification will be substantially reduced. At the same time, section 302 ensures that claimants harmed by defective products may recover from product sellers if the responsible manufacturer cannot be brought into court or is judgment-proof.

SECTION 303—UNIFORM STANDARDS FOR AWARD OF PUNITIVE DAMAGES

In general

Section 303 establishes a uniform standard of liability for punitive damages. Such damages may be awarded only if the claimant establishes by clear and convincing evidence that the harm suffered was the result of the manufacturer's or product seller's conscious, flagrant indifference to the safety of those who might be harmed by a product. Except in certain circumstances, punitive damages may not be imposed upon manufacturers or sellers of prescription and over-the-counter drugs, and medical devices, as well as the manufacturers of aircraft, for harm caused by those products, when the safety of those products has been approved by the appropriate Federal agency prior to the marketing of the product. The defense is unavailable to a medical or aviation manufacturer who committed fraud during the reviewing process by withholding or misrepresenting relevant information. The defense is also unavailable to a manufacturer of prescription and over-the-counter drugs and medical devices, if the defendant made an illegal payment to an official involved in the certification process for the purpose of securing approval of such drug or device. Finally, a manufacturer or product seller may request that the trier of fact conduct a separate proceeding on the punitive damages issues.

Present law

The purpose of punitive damages is to punish a defendant for outrageous conduct and deter such conduct in the future by the defendant and by others.[162] Such damages are a quasi-criminal sanction and, thus, go beyond compensating the claimant for the claimant's injuries. Punitive damages may be awarded to a claimant in civil actions in most States. Five states have prohibited punitive damage awards except in those instances where there is explicit statutory authorization for specific cases.[163]

The trier of fact has total discretion over whether punitive damages should be assessed against a defendant. State standards or guidelines for determining whether a defendant should pay punitive damages are not uniform; these standards involve some degree of conscious misconduct and refer variously to "willful," "wanton," "malicious," or "reckless" disregard for the rights of others.[164]

In most jurisdictions today, the claimant must prove by a preponderance of the evidence that the defendant acted in a manner that warrants punitive damages. However, 22 States have adopted a standard of clear and convincing evidence as the burden of proof for punitive damages. Nineteen States have done so by legislation, and three by judicial decision.[165] To reflect the quasi-criminal nature of such punishment, section 303 of the bill follows this emerging rule: the burden of proof is raised to clear and convincing evidence, a standard of proof closer to the criminal law standard for imposing punishment.

While commentators disagree as to the full extent of this growth, it is clear that punitive damage awards have been increasing both in size and in number in the past ten years. Until 1977, there had been only a small number of punitive damage awards in products liability cases. Since then, the frequency of these awards has in-

creased. Punitive damages are routinely sought [166] and, when awarded, tend to be very large.[167]

A claimant may include, as a routine matter, a count for punitive damages in a product liability complaint in order to have an opportunity to present evidence to the jury as to the resources of the defendant; [168] moreover, such claims discourage settlement, because of the absence of clear guidelines as to liability. As one legal scholar has noted:

> When the prospect of punitive damages enters the picture, these guidelines disappear. It is close to impossible to negotiate sensibly with a plaintiff who believes that he can shoot for the moon. Furthermore, a defendant who believes that the situation does not call for punitive damages cannot factor their potential into settlement discussions. To do so is to set a pattern for all future settlements in countless cases already in litigation or yet to be brought. In short, unless the situation truly calls for punitive damages, they sabotage settlement negotiations by thrusting a huge "unknown" into the negotiations.[169]

Moreover, punitive damage awards are excessive as most are reduced substantially after trial according to a recent study.[170] Further, as Prof. Kathryn Kelly of Catholic University observed, the deterrence effect of punitive damage awards is diminished when they are routinely overturned.[171] In order to be fair to defendants and to enhance the deterrent effect of punitive damages, juries need clear standards to apply when deciding whether a defendant's conduct merits the assessment of punitive damages.

At present, compliance with Government standards is not a defense against punitive damages.[172] Instead, courts generally are not bound by safety determinations made by regulatory agencies. The results have raised questions about judicial nondeference to agency determinations with respect to industries that are comprehensively regulated.[173] Such was the case, for example, when a Kansas jury decided to assess $8 million in punitive damages against the manufacturer of the Sabin polio vaccine, although this verdict was reversed on appeal.[174] One scholar concluded that the jury "was invited to, and did, impose punitive damages for the purpose of forcing the United States to change its polio vaccination policy." [175]

In a recent Supreme Court decision that addressed the issue of punitive damage awards *Pacific Mutual Life Insurance Co.* v. *Haslip,* the Court noted "once again our concern about punitive damages that 'run wild' " [176] According to Professor Kelly, the Court in *Haslip* indicated "that it had in several previous cases expressed a profound uneasiness with some of the common law punitive damage schemes in place in the various States." [177] She went on to say that the Court in *Haslip* has recognized that the due process clause puts limits on the ability of states to impose punitive damages, and has "invited" the legislature to enact punitive damage reform proposals along the lines of the provisions in this section.[178]

As reported

Section 303(a) specifies when punitive damages may be assessed against a manufacturer or product seller in a product liability action. If otherwise permitted by applicable law, punitive damage may be awarded to any claimant who establishes by clear and convincing evidence that the harm suffered was the result of conduct manifesting a manufacturer's or product seller's conscious, flagrant indifference to the safety of those persons who might be harmed by a product. While *Haslip* held that the Due Process Clause does not require that the burden of proof for damages be higher than a preponderance of the evidence, language in the *Haslip* opinion indicated that the Court looks favorably upon a clear and convincing standard.[179] The "clear and convincing evidence" burden of proof was recommended by the American Bar Association in 1987, by the American College of Trial Lawyers in 1989, and the ALI Reporters' Study in 1991.[180] Moreover, one State has adopted an even higher standard. Colorado requires proof beyond a reasonable doubt for the awarding of punitive damages.[181]

The standard of liability for punitive damages in this section requires a "conscious, flagrant indifference" to consumer safety. This is a high standard of culpability, requiring a showing of fault far in excess of mere negligence. The specifications that the misconduct be "conscious" and "flagrant" are designed to assure that punitive damages will not be assessed unless the defendant's conduct was knowingly far in excess of acceptable behavior. The misconduct must be an extreme deviation from ordinary conduct.[182] According to Professor Kelly, this standard "follows the Supreme Court's lead" in *Haslip* by requiring intentional conduct.[183]

It is important to establish the punitive damages threshold far from ordinary negligence in order to assure that manufacturers are not subjected to punitive damages assessment, on top of compensatory damages, for making good faith errors.[184] As one legal scholar has explained:

> [E]ven if the product is finally found "defective," the case for punitive damages almost always will be quite weak if a plausible case for nondefectiveness was made the other way. Such damages usually will not be appropriate unless the product was very defective, and plainly so, at the time it was sold. A plaintiff usually should be entitled to a directed verdict on defectiveness, or close thereto, before the punitive damages issue is properly before the jury at all.[185]

Finally, to be "conscious" of its flagrant misconduct, a manufacturer or product seller must be aware that its product is legally defective and that its conduct in selling it in such a condition is therefore improper. Mere consciousness that its product is dangerous, that it can or indeed probably will cause substantial harm or even death, is thus insufficient by itself, since manufacturers of many dangerous products—such as cars, power saws, and chemicals—surely are fully conscious of the inherent dangers in their products.[186] It is only when a manufacturer consciously leaves in its product a danger that is unreasonable, and sells the product to the

public knowing it to be defective, that its conduct can be said to manifest a "conscious, flagrant indifference" to consumer safety.[187]

Section 303(a) adds that a failure to exercise reasonable care in choosing among alternative designs, formulations, instructions, or warnings is not, in itself, conduct for which the award of punitive damages would be appropriate. This sentence clarifies further the punitive damages standard of liability by drawing a clear distinction between mere negligence and the aggravated misconduct which justifies the imposition of punitive damages. The mere failure to exercise reasonable care as to such a choice does not, in itself, warrant the imposition of punitive damages. In some circumstances, however, failure to exercise reasonable care as to a whole series of choices might constitute aggravated misconduct for which punitive damages are appropriate.

The "clear and convincing evidence" standard of section 303(a) requires more proof the "preponderance of the evidence" standard of proof traditionally used in civil actions; however, it requires less proof than the "beyond a reasonable doubt" standard that is required for use in criminal actions.[188] Thus, it is a standard of proof between the civil and criminal standards. This standard is appropriate for determining what is, in effect, a quasi-criminal sanction in a civil case.[189] It is proposed in the Uniform Product Liability Act and has recently been adopted by some States as the sound and fair rule.[190]

The rationale for the higher standard of proof rests on fairness. As one commentator explained:

> [A]n unjustified punitive damages award causes more harm to the defendant than erroneous failure to award punitive damages to the plantiff. To reflect this imbalance, the burden of proof should favor the defendant more than does the "a preponderence of evidence test."[191]

A higher standard of proof is necessary to ensure that punitive damages are assessed only where appropriate.

Section 303(a) adds, as well, that punitive damages may not be awarded in the absence of a compensatory award, except as provided in subsection (b), which addresses an issue that is unique to the wrongful death law of a few States. Section 303(b) relates to wrongful death product liability actions where applicable State law provides, or has been construed to provide, that only punitive damages are recoverable.[192] In these unique situations, punitive damages are a substitute for compensatory awards. In such situations, a defendant is liable for punitive damages regardless of whether a claim is asserted under section 303. Further, recovery of damages in such an action shall not bar a claim under this section.[193]

Section 303(c) bars an award of punitive damages against manufacturers and sellers of prescription and over-the-counter drugs (including vaccines and other biologicals), and medical devices, as well as against manufacturers of aircraft including aircraft components, for harms caused by those products, when the safety of those products has been reviewed and recognized by the appropriate Federal agency. This defense is consistent with the recommendations of the ALI Reporters' study and the views of Peter Huber and Robert

Litan, editors of "The Liability Maze." [194] Five States have enacted similar FDA defenses against punitive damages.[195] The defense in section 303(c) is not, however, available to any defendant who has committed fraud during the approval or review process by withholding or misrepresenting material and relevant information, with respect to the approval or review of the product in question, from any agency involved in the approval or review process. The defense is also unavailable to any manufacturer or seller of prescription and over-the-counter drugs or medical devices that makes an illegal payment to an FDA official for the purpose of securing approval of such drug or device. This last limitation on the defense is in response to the generic drug approval scandal.[196]

Section 303(c) is intended to deal with the question of imposition of punitive damages in those actions involving drugs, medical devices, and aircraft. It is not intended to preempt state laws that may establish any other defense against liability in product liability actions based on compliance with Government standards or the requirements of statutes or regulations concerning product design, labeling, or warnings.

This defense applies to drugs as defined in section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1)) or medical devices as defined under section 201(h) of the same Act. Punitive damages shall not be awarded when these products are approved by the Federal Food and Drug Administration (FDA) and are subject to premarket approval by the agency with respect to the safety of the formulation or performance of the aspect of such drug or device which caused the claimant's harm, or the adequacy of the packaging or labeling of such drug or device.[197] In addition, this provision applies to drugs that are generally recognized as "safe and effective" pursuant to conditions established by the FDA and applicable regulations, including packaging and labeling regulations.

Likewise, this defense applies to aircraft which are subject to premarket certification by the Federal Aviation Administration (FAA) with respect to the safety of the design or performance of the aspect of such aircraft which caused the claimant's harm or the adequacy of the warnings regarding the operation or maintenance of such aircraft. Punitive damages shall not be awarded against the manufacturer of such an aircraft or aircraft components certified by FAA under the Federal Aviation Act of 1958 (49 App U.S.C. 1301 et seq.), provided the manufacturer complied with FAA requirements and obligations regarding continuing airworthiness after delivery of the aircraft to a user. This includes FAA requirements to provide maintenance and service information related to airworthiness whether or not such information is used by the FAA to prepare mandatory maintenance, inspection or repair directives.

The Federal Government has implemented comprehensive regulatory structures which require that a governmental agency regulate the safety of products such as drugs and aircraft.[198] The Government has delegated to an agency with specific expertise the ability and obligation to establish reasonable and effective safety standards. The Government has established and funded these regulatory systems to assess the safety risks of these products for consumers. Where the Government has carefully assessed these risks

and certified that these products meet safety standards established by expert regulatory agencies, manufacturers should not be punished by individual juries or threatened with punitive damages on a case-by-case basis. Moreover, imposing tort liability on top of safety regulation can result in overdeterrence of socially desirable products and activities.[199] According to the ALI Reporters' study, regulatory compliance should be available as a defense.[200]

Section 303(c) contains a provision removing this defense where a defendant has withheld or misrepresented material and relevant information concerning the product's performance, operation, or maintenance. The rationale behind the defense is based on the Federal Government's access to and knowledge of product information. Thus, section 303(c) of the bill shields a defendant from punitive awards only if it has disclosed to the appropriate Federal regulatory agency all required information during and after the licensing process. Where a defendant withholds information or misleads a Federal agency or official, the defense shall not apply.

Section 303(c)(1)(B)(ii) provides further that in any case in which a defendant made an illegal payment to an official from FDA in order to secure approval of a drug or medical device, the defendant is not afforded the protection against punitive damages provided in section 303(c).

In sum, section 303(c) represents a congressional determination that drugs and aircraft are so extensively regulated for society's benefit that punitive damages are not appropriate. In the case of these products, the Government has conducted a thorough review of the product's safety aspects and risks and has dedicated a great deal of resources to assessing its benefits and risks for society. As a result, the tort system should defer to that regulatory judgment.

Section 303(d) provides that a manufacturer or product seller may request that the trier of fact conduct a separate proceeding to consider (1) whether punitive damages are to be awarded and the amount of such award, or (2) the amount of punitive damages following a determination of punitive liability. In such a proceeding, evidence relevant only to the claim of punitive damages, as determined by state law, shall be inadmissible in any proceeding to determine whether compensatory (economic and noneconomic) damages are to be awarded. The American Bar Association, the American College of Trial Lawyers, and the ALI Reporters' study have recommended bifurcation of punitive damage claims. These groups believe bifurcation can avoid prejudice to defendants by providing that evidence of wealth or financial condition is admissible only on the punitive damage claim.[201]

Section 303(e) provides that when the trier of fact determines the amount of punitive damages to be awarded, all relevant evidence should be considered including the financial condition of the manufacturer or product seller, the severity of harm, the duration of the conduct, any concealment of the conduct, the profitability of the conduct, the number of products sold, other awards of punitive or exemplary damages to persons similarly situated to claimant, and any criminal penalties or civil fines assessed against the manufacturer or product seller as a result of the conduct complained of by the claimant.

Section 303 does not preempt State laws that limit the amount of punitive damage awards nor does it create any rights to punitive damages in those States that do not currently permit recovery of punitive damages.

SECTION 304—UNIFORM TIME LIMITATIONS ON LIABILITY

In general

Section 304 establishes uniform standards of limitation and repose. All civil actions governed by the bill are subject to a uniform statute of limitations that runs for 2 years from the discovery of the harm and its cause. In addition, such actions are subject to a 25-year statute of repose, which establishes the time period during which a manufacturer or product seller may be held responsible for harm allegedly caused by capital goods, except in cases involving toxic harm. The statute of repose applies only in cases where the claimant is entitled to receive worker's compensation benefits.

The 2-year statute of limitations for product liability actions begins to run when the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. This provision will ensure that a claim is not barred before the claimant knows or has reason to know about the claimant's harm. A uniform statute of limitations for product liability actions will benefit injured persons whose rights to sue will no longer depend on which state statute happens to apply to their claim.

This section's 25-year limitation on liability for harm allegedly caused by capital goods, referred to as a statute of repose, bars actions seeking recovery for harm caused by such products. This time limitation on liability establishes the period during which a manufacturer or product seller may be held responsible for harm caused by the product. The rationale for this time limitation is that manufacturers and product sellers of capital goods, which usually have a long life, should not be exposed to liability for harms caused by these products for an unlimited period of time.[202]

Present law

All States have statutes of limitations that have been applied to product liability actions.[203] A statute of limitations specifies that time within which the claimant must file his or her action. Failure to file within the specified time bars the claim.

In a number of States, the statute of limitations period begins to run at the "time of injury." [204] When an injury caused by a product is immediate and traumatic, this date is easy to determine. The claimant generally knows of his or her harm and the cause of the harm at the time of the injury. However, where the harm has a latency period or becomes manifest only after repeated exposure to the product, the claimant may not know immediately of the harm or its cause. In these situations, a "time of injury" statute of limitations may expire and bar a claim before the claimant even knows he or she has been harmed.

In response to this problem, some courts and State legislatures have adopted a rule under which the limitations period begins to run when the claimant discovers the harm.[205] Even this rule may be unfair, however, because the claimant may not discover the

actual cause of his or her harm until some time after he or she discovers the harm itself. The statute of limitations may expire before the claimant can reasonably discover both his or her harm and its cause.[206]

A growing number of courts and State legislatures have addressed this problem by adopting a statute of limitations that does not expire until the claimant discovers both the claimant's harm and the cause of the harm.[207] The Committee believes that this rule is the better reasoned approach and that it strikes a fair balance between the interests of the parties.

As noted, section 304 also establishes a uniform statute of repose for product liability actions. Sixteen States have adopted such statutes of repose in response to the problems created by open-ended liability for old products—the so-called long tail of liability.[208] Some States have adopted conclusive statutes, which establish an absolute bar to product liability actions for harms caused after a specified period. These time periods range from 8 to 12 years and are applicable to harms caused by all products.[209]

As reported

Section 304(a) provides that in any civil action brought under the bill, the complaint must be filed within 2 years of the time the claimant discovers or, in the exercise of reasonable prudence, should have discovered the harm and its cause. Actions filed more than 2 years after the harm and its cause were or should have been discovered are barred.

If a person with a product liability claim has a legal disability—for example, the person is a minor or is insane—the person may file his or her complaint any time until 2 years after the legal disability ceases. If the filing of a product liability complaint is stayed or enjoined by court order, the running of the 2-year period of limitations is suspended until the stay or injunction is lifted or ceases. According to Prof. James Henderson, this is a liberal discovery of harm provision which will improve the lot of injured persons who file a lawsuit in a jurisdiction that does not have such a provision.[210]

Section 304(b) provides that any product liability action alleging harm, which is not toxic harm,[211] caused by a capital good is barred unless the complaint is served and filed within 25 years of the date of delivery of the product to its first purchaser or lessee who has not engaged in a business of selling or leasing the product or using the product as a component part. Peter Huber and Robert Litan, editors of "The Liability Maze," endorsed statutes of repose for nontoxic products, reasoning that it is unfair to impose liability on a product that has been in the market for decades and never found previously to be liable for an injury.[212] Section 304(b) applies only if the claimant has received or is eligible to receive workers' compensation benefits for harm caused by the product. Section 304(b)(3)(B) defines "capital good" as any product or component part of any product, which is both of a character and type depreciable under the Internal Revenue Code of 1954, and (1) used in a trade or business, (2) held for production or income, or (3) sold or donated to a governmental or private entity for the production of goods, for training, for demonstration, or other similar purposes.

Section 304(b)(3) provides that any motor vehicle, vessel, aircraft, or railroad used primarily to transport passengers for hire shall not be subject to the time limitations set forth in subsection (b).

Section 304(c) provides that the time limitations in this section do not affect the right of any person to seek contribution or indemnification from the person who is actually responsible for the harm.[213]

SECTION 305—UNIFORM STANDARDS FOR OFFSET OF WORKERS' COMPENSATION BENEFITS

In general

According to Prof. Aaron Twerski, a Federal product liability law must address the unjust results that arise from the conflict between tort and workers' compensation systems. The solution proposed in S. 640 addresses this problem in a rational way.[214]

Section 305 clarifies the relationship between the workers' compensation system and the product liability system with rules that keep these systems separate, minimize legal costs, and promote safety. Section 305 eliminates the employer's subrogation lien and strengthens employer immunity from tort liability without affecting the employer's obligation to pay workers' compensation benefits. The exception is when the employer can prove that it or the employee-claimant's coworkers were in no way responsible for the claimant's harm. Further, a manufacturer is prohibited from suing an employer for contribution to a product liability award. If the employer attempts to assert a subrogation lien, the employer loses his or her protection against a suit for contribution. These rules provide economic incentives for the employer to minimize workplace accidents and, by eliminating the subrogation lien in most cases, Section 305 reduces transaction costs. The employee-claimant obtains from the employer the workers' compensation benefits to which he or she is entitled and may obtain tort damages from the responsible manufacturer reduced by the amount of benefits he or she has been paid. Subtracting the amount of workers' compensation benefits from the product liability judgment prevents double recovery by the employee, and, thus, serves the purpose of the subrogation lien without the associated legal costs. The manufacturer pays for the harm caused by the manufacturer's own conduct and the conduct of the employer or coworker less the amount of workers' compensation. Reforms similar to those contained in section 305 are supported by the ALI Reporters' study.[215]

Present law

Workers' compensation statutes are designed to ensure that an employee injured in the course of his or her employment has a fast and inexpensive way to recover for his or her injury, regardless of who, if anyone, is at fault for causing the injury. The employer automatically pays workers' compensation benefits to an employee injured in the course of employment, without regard to fault. As originally conceived, workers' compensation is a tradeoff: While the employer is liable regardless of fault, the employer is immune from tort liability for the injury. Workers' compensation was, thus, intended to be the employee's exclusive remedy against the employer

for work-related injuries.[216] The purpose of the system is to provide swift and certain recovery for injured workers, while maximizing the incentives for employers to maintain a safe workplace.

However, the safety incentive provided by workers' compensation has been undermined by the subrogation lien, which allows an employer to shift the costs of the workers' compensation system to the product liability (tort) system.[217] In most States, an employer can recover the amount of workers' compensation benefits the employer pays to an injured employee through a subrogation lien, if the employee has a successful product liability claim against a manufacturer or product seller. This is done regardless of whether the employer is responsible for the injury.

Some States have gone to the other extreme by permitting employees and manufacturers in product liability actions to recover from the employer. Also, employees have been permitted in some States to bring product liability suits against their employers. In addition, manufacturers have been permitted in a few States to sue employers in contribution and implied indemnity actions on the basis that it was the employer who caused all or a part of the employee-claimant's harm.[218] Other States permit such suits, but limit the amount recoverable to the employer's workers compensation liability.[219] Most jurisdictions, however, respect the employer immunity concept and do not permit a manufacturer to shift the tort judgment to the employer through a contribution or indemnity action.[220]

In sum, the current relationship between the workers' compensation system and the product liability system generates substantial and unnecessary legal costs, leads to unfair cost shifting between the two systems, and may reward unsafe workplace practices.

As reported

Section 305(a) specifies how product liability judgments are calculated in actions involving claimants who are entitled to workers' compensation benefits. Any damages awarded would be reduced by the value of past and future workers' compensation benefits received for the same harm. A court or jury determination of workers' compensation benefits shall have no binding effect on and shall not be used as evidence in any other proceeding.

The calculation works as follows. The claimant's total damage for which the defendant would be liable is reduced by the amount of workers' compensation benefits that the claimant is entitled to receive under State or Federal law for the same harm.[221] Judgment is then entered in the amount remaining against the defendant.

Section 305(b) provides that a claimant in a court action subject to this title who is or may be eligible to receive workers' compensation benefits must provide written notice to the employer of the filing of the civil action within 30 days of the filing. Such notice must include the following information: the date of the filing; the court in which the civil action was filed; the names and addresses of all plantiffs and defendants appearing on the complaint; the court docket number, if available; and a copy of the complaint. This notice must be filed with the court and served on all parties. Failure by the claimant to comply with these requirements will

result in the suspension of the deadlines for filing responsive pleadings and commencing discovery proceedings, until the claimant complies with this requirement. The purpose of this requirement is to preserve the rights of an employer to pursue a subrogation lien pursuant to the terms of this section.

Section 305(c) permits a claimant, who has sole discretion to seek a stay, to obtain a stay in the product liability action until the amount payable as workers' compensation benefits has been determined under the workers' compensation law.

Section 305(d)(1) eliminates the employer's subrogation lien—the right of an employer to recover the amount of workers' compensation benefits paid to the injured employee-claimant in a product liability action.

Unless the manufacturer or product seller has expressly agreed to indemnify or hold the employer harmless for harm caused by a product, neither the employer nor the workers' compensation insurance carrier of the employer shall have a right of subrogation, contribution, or implied indemnity against the claimant's recovery from a manufacturer or product seller. This provision will reduce the transaction costs associated with pursuing a subrogation lien.

Section 305(d)(2) provides that a claimant's employer or the workers' compensation insurer of the employer may assert a subrogation lien by providing that the claimant's harm was in no way caused by the fault of the claimant's employer or coworkers. An employer's or the employer's workers' compensation insurer's right to establish this fact is preserved by intervening in a civil action. If the civil action is resolved prior to entry of a verdict by the trier of fact, any resolution of the action by settlement or other means shall afford the employer or the workers' compensation insurer of the employer an opportunity to assert a right of subrogation, contribution or implied indemnity if the employee-claimant's harm was not in any way caused by the fault of the claimant's employer or coworkers. This is a procedural safeguard to preserve the employer's right under this section to assert that he or she and the claimant's coworkers were in no way responsible for the claimant's injuries.

Section 305(e)(1) eliminates contribution and indemnity actions by third-party tortfeasors against the employer or coworker of the claimant, except as provided in section 305(f). A minority of jurisdictions allows a third-party tortfeasor, such as a manufacturer or product seller, to pursue a claim against the employer or coworker alleging that the employer or coworker was at fault and should pay all or part of the product liability judgment. Permitting a manufacturer to sue an employer for an employee accident undermines the workers' compensation principal that the employer or coworker should be immune from tort liability.

Section 305(e)(2) adds that the bill does not affect any other provision of State or Federal workers' compensation law prohibiting a person entitled to workers' compensation benefits from recovering for harm caused by a product in any action except a workers' compensation claim against an employer, coworker, workers' compensation insurer of the employer, or the exclusive representative of the injured person. Section 305(e) also states that the bill is not intended to affect any workers' compensation laws that permit claim-

ants to recover on the basis of a claim of intentional tort by the employer or coworker. These intentional torts include, for example, assault, battery, trespass or false imprisonment.

Section 305(f) provides that section 305(e) shall not apply and applicable State law shall control if the employer or the workers' compensation insurer of the employer, in a civil action subject to this title, asserts or attempts to assert, because of section 305(d), a right of subrogation, contribution or implied indemnity against the manufacturer or product seller or a lien against the claimant's recovery from the manufacturer or product seller.

Section 305 applies only to claims involving workplace injuries that are subject to State or Federal workers' compensation statutes. Therefore, where a product liability action involves a workplace injury covered by other laws, such as the Federal Employers Liability Act, 45 U.S.C. Section 51, section 305 does not apply. Section 305 only affects the rights of subrogation in product liability actions. This provision does not affect nonproduct-related subrogation claims, which frequently arise in such industries as the construction industry.

SECTION 306—SEVERAL LIABILITY FOR NONECONOMIC DAMAGES

In general

Section 306 provides that the liability of each defendant in a product liability action for noneconomic damages shall be several only and shall not be joint. Noneconomic damages, for the purposes of this section, are subjective, nonmonetary losses, including pain and suffering awards. Each defendant shall be liable only for the portion of noneconomic damages allocated to it in accordance with its proportionate share of responsibility. The basic policy underlying this section is to address inequitable application of the doctrine of joint and several liability that makes one defendant pay for the misconduct of another.

Joint and several liability was limited originally to situations where defendants had conspired with one another to harm a plaintiff—so-called concert of action. Today, it has been extended far beyond its original application to situations where defendants' conduct played any role, however minor, in causing a harm. In such circumstances, the full implementation of joint and several liability can have inequitable consequences. When joint and several liability is applied, counsel for a claimant need not pursue a wrongdoer whose conduct played a principal role is causing the harm at issue so long as there is a larger "deep-pocket" defendant available. In those instances where certain defendants are not equipped to pay damages in proportion to their responsibility, the claimant can obtain the entire cost of that harm on the "deep-pocket" defendant even though its participation in the harm was relatively small.

This section takes a balanced approach to the problem by limiting the application of joint and several liability to situations where it is defensible on public policy grounds—where a person's economic loss otherwise would be uncompensated. The ALI Reporters' study also recommends reforming the doctrine of joint and several liability.[222] This distinction between economic and noneconomic loss is consistent with the underlying policy of joint and several li-

ability to make the injured party whole. It does not preclude the claimant from being made whole for actual losses while limiting a defendant's liability for noneconomic losses to that portion for which the defendant is responsible.

Present law

The application of joint and several liability must be understood in the context of legal history. This doctrine holds one person responsible for another's conduct. It arose at common law in connection with procedural joinder of parties. At first, joinder was limited and was usually permitted when two or more defendants had conspired to harm a claimant—when they had engaged in "concert of action" by wrongfully pursuing a common scheme or plan that was likely to result in injury to another. Joint and several liability meant that the persons who acted in concert were equally at fault and jointly responsible for the harm; thus, the injured person could recover damages from any one of them.[223]

A growing number of States have abolished or modified the doctrine of joint and several liability.[224] In June 1986, those voting in a California State referendum approved an initiative measure to abolish joint and several liability with respect to noneconomic damages.[225] Section 306 is modeled on that initiative.

As reported

Section 306 (a) and (b) limit each defendant's liability for noneconomic damages to that defendant's percentage of responsibility as determined by the trier of fact. The result is that, in any product liability action, the liability of each defendant for noneconomic damages shall not be joint and several.

In most cases the percentage determination required by this section will not be subject to an exact mathematical computation. Rather, it will be based on the commonsense approximation assigned to it by the jury or by the court.

In determining the percentage of each defendant's liability, the trier of fact should take into consideration the proportionate share of each party's responsibility for the total harm caused, including that portion attributable to the claimant. The focus of the inquiry should be on the defendant's "responsibility." For example, if a defendant's share of responsibility for the harm is found to be 25 percent, that defendant is liable for 25 percent of the noneconomic damages.

Section 306 does not specify who has the burden of proof as to apportionment of noneconomic loss. Based on the evidence presented, the trier of fact should apportion responsibility among all parties.[226] All the parties will have an opportunity to present their case to the trier of fact as to the appropriate apportionment of responsibility, so that liability can be assigned based on that apportionment. The trier of fact shall make a determination as to apportionment without a requirement that any particular party "prove" which apportionment formula should be applied.

Responsibility should be apportioned for the purposes of this section among all persons who are parties to the action at the conclusion of the trial and persons who were parties to the action and have entered into settlement agreements with the claimant.[227]

Courts should apply existing law with regard to the effect of settlement on the judgment and the settlor, but, for purposes of apportioning responsibility under subsection (b), the responsibility of the settlors who were parties should be included in the apportionment.

Section 306(c)(1) defines "noneconomic damages" for the purposes of section 308 and includes an illustrative, nonexhaustive list of examples.

Section 306(c)(2) provides that, for the purposes of this section, a product liability action includes "any action involving a claim, third-party claim, cross-claim, counterclaim, or contribution claim in a civil action in which a manufacturer or product seller is found liable for harm caused by a product." This subsection gives nonproduct liability defendants the protection of section 306 whether the product manufacturer or seller is an original party to the suit or brought in through impleader. To make the point explicit, the Committee included the words "third-party claim" in subsection (c)(2).

Section 306 limits the doctrine of joint and several liability as applied to noneconomic damages in product liability actions. This section, however, does not preempt other limitations on joint and several liability with respect to economic damages, which have been imposed by individual jurisdictions. Indeed, a number of jurisdictions have enacted more sweeping reform with respect to joint and several liability.[228] These reforms are in no way affected by the Committee's action.

SECTION 307—DEFENSES INVOLVING INTOXICATING ALCOHOL OR DRUGS

In general

Section 307 establishes a complete defense for manufacturers or product sellers in actions subject to the bill, if the claimant was under the influence of intoxicating alcohol or any drug and such condition was more than 50 percent responsible for the accident or event that resulted in the claimant's harm. Barring liability in such cases is sound public policy. The use of intoxicating alcohol and drugs for nonmedicinal purposes by a person creates serious risks to the safety of such a person and to the safety of others. For example, drunk driving is a major cause of death on our highways. A person who impairs his or her ability to act safely should not be able to shift the cost of such risks on to the manufacturer or seller of a product used by such person and ultimately on to society itself. This rule will encourage persons to take responsibility for their own safety and the safety of others.

The Committee has chosen the rule that would require that a claimant be more than 50 percent responsible so there would be no question as to the principle cause of the harm—alcohol or drug use. In order to avoid the inequitable shifting of liability on to other codefendants, such as municipalities, the Committee also has made section 307 applicable only in cases where manufacturers or product sellers are subject to liability and no liability exists against those codefendants who are not manufacturers or product sellers.

Present law

The State of Washington has enacted tort legislation that establishes a complete defense to an action for damages for personal injury or wrongful death, if the person injured or killed *was* under the influence of intoxicating liquor or any drug and such condition contributed to more than 50 percent to his or her wrongful death.[229] This provision was included as part of Washington tort reform legislation that was enacted "in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance." [230] A provision of this nature is an important component of federal product liability reform.

The very strong public policy underlying this rule justifies preemption of conflicting State laws—it is a national policy of overriding importance to the American public. Thus, if a State has pure comparative fault as its general rule of tort law, this provision will prevail if claimant was under the influence of alcohol or any drug and such condition was more than 50 percent responsible for the harm. On the other hand, if a State retains the contributory negligence defense and believes that a person's claim should be barred if the person's fault in any way contributed to his or her harm, this bill is not preemptive. It only addresses situations in which, currently, a person could bring a successful claim when such person was more than 50 percent responsible due to drugs or alcohol.

As reported

Section 307(a) provides that in any civil action subject to this bill in which all defendants are manufacturers or product sellers, such defendants may assert as a complete defense that the claimant was under the influence of intoxicating alcohol or any drug and that such condition was more than 50 percent responsible for the accident or event that resulted in such claimant's harm. This complete defense to liability for manufacturers or product sellers only applies in case in which all defendants are manufacturers or product sellers, because otherwise the result might be to release manufacturers or product sellers from liability, while leaving, other defendants (such as municipalities) liable for the claimant's entire loss. While it is unjust for an intoxicated person who is primarily to blame for his or her own harm to recover in tort for his or her injuries, it would be still more unjust to release some defendants from liability in such a case while leaving others to bear the entire amount of damages.

Section 307(b) provides that in any civil action in which some, but not all, of the defendants are manufacturers or product sellers, and that the trier of fact determines that no liability exists against those defendants who are not manufacturers or product sellers, the court shall enter a judgment notwithstanding the verdict in favor of any defendant manufacturer or product seller, if it is proved that the claimant's intoxicated condition was more than 50 percent responsible for the accident or event which resulted in such claimant's harm. Thus, if a manufacturer or product seller was barred from invoking section 307(a) because of the presence of codefendants who were not manufacturers or product sellers, and those co-

defendants were not found to be liable, the manufacturer or product seller could still be released from liability pursuant to this provision.

Section 307(c)(1) provides that the determination of whether a person is under the influence of intoxicating alcohol shall be made pursuant to applicable State law. For example, if applicable State law provides that a particular amount of alcohol in a person's blood is evidence that the person was under the influence of intoxicating alcohol, that standard shall apply. Paragraph (2) of subsection (c) defines the term "drug" as any non-over-the-counter drug which has not been prescribed by a physician for use by the claimant.

FOOTNOTES TO THE REPORT ON S. 640

[1] P.W. Huber and R.E. Litan, eds., *The Liability Maze* at 3, Brookings, 1991. (Hereinafter *The Liability Maze*). The preface of The Liability Maze states:

"The President (of the Brookings Institution) bears final responsibility for the decision to publish a manuscript as a Brookings book. In reaching his judgment on the competence, accuracy, and objectivity of each study, the President is advised by the director of the appropriate research program and weighs the views of a panel of expert outside readers who report to him in confidence on the quality of the work. Publication of a work signifies that it is deemed a competent treatment worthy of public consideration but does not imply endorsement of conclusions or recommendations.

"The Institution maintains its position of neutrality on issues of public policy in order to safeguard the intellectual freedom of the staff. Hence interpretations or conclusions in Brookings publications should be understood to be solely those of the authors and should not be attributed to the Institution, its trustees, officers, or other staff members, or to the organizations that support its research."

[2] Enterprise Responsibility for Personal Injury, American Law Institute, Reporters' Study, Vol. I, at 270–71. (Hereinafter ALI Reporters study). This study has not been adopted by the American Law Institute and does not represent the position of the Institute. Nevertheless, ALI's bylaws authorize its publication. The Chief Reporter for the study is Professor Paul Weiler of Harvard Law School. Associate Reporters are: Professor Kenneth Abraham of the University of Virginia Law School; Professor Robert Rabin of Stanford University Law School; Professor David Rosenberg of Harvard Law School; Professor Alan Schwartz of Yale Law School; and W. Kip Viscussi, Professor of Economics at Duke University.

[3] *Id.* at 60.

[4] *Id.*

[5] Testimony of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, on April 5, 1990.

[6] Statement of Howard H. Fark, Senior Vice President, Minster Machine Company, before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, February 22, 1990 at 3.

[7] *See, e.g.*, Speech to the American Law Institute by Chief Justice of the United States Warren E. Burger, May 13, 1986.

[8] U.S. Department of Commerce, Bureau of the Census, *1990 Statistical Abstract of the U.S.*, Chart No. 314, p. 184 (110th ed. 1990).

[9] *Id.* Most commentators agree that 90 to 95 percent of all product liability cases are filed in state courts. Statement of Deborah Hensler, Rand Institute for Civil Justice, before the consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, September 12, 1991 at 3 (hereinafter September 12, 1991 hearing). At the September 19, 1991 hearing on S. 640, a witness challenged the contention that product liability filings are increasing. Statement of Professor Marc Galanter before the Senate, September 19, 1991 (hereinafter September 19, 1991 hearing). Mr. Galanter studied product liability filings only in federal courts. He found that product liability filings between 1985 and 1990 increased by 49 percent. He contends, however, that when litigation involving asbestos is removed from the data, case filings in federal court decreased during that time. *Id.* at 2. Based on that conclusion and "scattered evidence" that product liability filings account for two to three percent of tort cases in state courts, he concludes that a "sizeable" portion of product liability cases are filed in federal courts. *Id.* at 5–6. Deborah Hensler testified, however, that there are no useful data from state courts on product liability filings and one cannot infer trends in state courts from federal court data. Statement of Deborah Hensler, *supra*, at 3–4.

Opponents of product liability reform also have cited a recent law review article, which found that courts were ruling in favor of product liability defendents more during the late 1980s than in earlier years. Henderson and Eisenberg, "The Quiet Revolution in Product Liability: An Empirical Study of Legal Change," 37 U.C.L.A. Law Review 479 (1990). One of the authors of this study, professor James Henderson, testified that, based on his examination of relevant data, he supports enactment of a federal product liability law, and specifically, S. 640. September 19, 1991 hearing (transcript at 106). He testified further that, regardless of the recent trends he

identified, further reform is necessary to make product liability laws more fair, and it must be done on the national level. Id. (transcript at 107). Professor Henderson's views are underscored by Professor George Priest who found no evidence that the expansion of litigation has affected the death or injury rate. "Product Liability Law and the Accident Rate," in *Liability: Perspectives and Policy*, edited by R.E. Litan, and C. Winston, 184-222 at 187-194.

[10] U.S. General Accounting Office; Report to the Chairman, Subcommittee on Commerce, Consumer Protection, and Competitiveness; Committee on Energy and Commerce, House of Representatives; *Product Liability: Verdicts and Case Resolution in Five States*, at 25 (Sept. 1989) [hereinafter GAO Report].

[11] *Id.* at 29.

[12] *Id.*

[13] *Id.* at 52-53.

[14] *Id.* at 54.

[15] Testimony of James S. Kakalik, Ph.D., The Institute for Civil Justice of the Rand Corporation, before the Subcommittee on Trade, Productivity, and Economic Growth of the Joint Economic Committee, July 29, 1986, S. Hrg. 99-1090. The same conclusion was reached in a study done by an actuarial consulting firm for members of the insurance industry. The study found that in 1984, 63 percent of the gross insured costs of the United States tort system consisted of payments to claimants. Robert W. Sturgis, "The Cost of the U.S. Tort System," Tillinghast, Nelson, and Warren, Inc. (November, 1985) at 16. If this is reduced by one-third to account for plaintiffs' attorneys' fees, only 42 percent of the costs remain to compensate the injured. Dr. Kakalik, author of the Rand study, explained in his testimony that Sturgis' estimate of transaction costs "is higher than ours because it includes the cost of insurance premiums that cover claims, lawsuits, and the operation of the insurance system. We only report on compensation and costs directly associated with tort lawsuits."

[16] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 11 (1977). A witness at the September 12, 1991 hearing pointed out that the results of this study are over a decade old. Testimony of Deborah Hensler (transcript 106). Nevertheless, more recent studies cited by the editors of *The Liability Maze* confirm these findings. They state that roughly half of total awards and settlements are paid to lawyers and insurers to administer the claim settlement process. *The Liability Maze* at 2, citing Kakalik and Pace, "Cash and Compensation Paid in Tort Litigation," R-3391-ICJ: The Rand Corporation (1986); Schotter and Ordover, "The Cost of the Tort System," New York University, C.U. Starr Center for Applied Economics (March 1986). Further, a 1989 study cited by the editors of *The Liability Maze* found that while the tort system imposes transaction costs of approximately one-half, transaction costs consume only 30 percent of the costs of the workers compensation system, 15 percent of health insurance, and just one percent of the social security system. *The Liability Maze* study at 2, citing Tillinghast, Perrins-Tower Group. *Tort Cost Trends: An International Perspective* at 16 (Dec. 1989).

[17] Andrew Schotter and Janusz Ordover, The Cost of the Tort System I, New York University, *supra*.

[18] *Id.*

[19] Tillinghast, *supra*.

[20] *Id.* at A3.

[21] ALI Reporters' study, *supra*, at n. 3.

[22] Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1527 (1987).

[23] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results, 79-80 (1977).

[24] Alliance of American Insurers Survey of Large-Loss Product Liability Claims 4 (1980).

[25] GAO Report, *supra* note 6, at 49.

[26] *Id.*

[27] Wayne E. Green, *A Lawyer Faces Risks In Deciding to Take On Costly Damage Suits, Wall St. J.*, May 23, 1986 at 12.

[28] *See* O'Connell, *A 'Neo No-Fault' Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 Calif. L. Rev. 898, 901-902 (1985), citing Corstevet, *The Uncompensated Accident and Its Consequences*, 3 Law & Contemp. Probs, 466, 468 (1936).

[29] Statement of Leonard Bender, M.D., on behalf of the American Congress of Rehabilitation and the American Academy of Physical Medicine and Rehabilitation, in Federal Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings before the Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, 95th Cong., 1st Sess., Serial No. 95-55, 594 (1977).

[30] Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results 49 (1977).

[31] *Id.* at 383.

[32] Alliance of American Insurers Survey of Large-Loss Product Liability Claims iii (August, 1980). This study almost certainly overestimates the compensation that injured victims are receiving; it only includes cases where payment exceeded $100,000 and thus does not average in cases where the claimant had large economic losses, but received less than $100,000—or nothing at all.

[33] Sugarman, *Doing Away with Tort Law*, 73 Cal. L. Rev. 555, 594 (1985).

[34] Testimony at Feb. 27, 1986 hearing before Consumer Subcommittee, Senate Committee on Commerce, Science, and Transportation.

[35] *See, e.g.*, S. Rept. 98-476, pp. 3-4; Guido Calabresi and Alvin K. Klevorick *Four Tests for Liability in Torts*, 14 J. Leg. Stud. 585, 585-6 (1985).

[36] *See e.g.*, Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Leg. Stud. 461, 521-7 (1985); Twerski, *A Moderate and*

Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution, 18 U. of Mich. J. of L. Reform 575, 580–599 (1985).

[37] *See e.g.*, O'Connell, *Offers That Can't be Refused*, 77 Nw. U.L. Rev. 589, 590–591; McCormick, *Handbook on the Law of Damages*, 318 (1935) p. 11.

[38] Twerski, *A Moderate and Restrained Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. Mich. J. of L. Ref. 575, 612 (1985).

[39] Statement of Professor Aaron Twerski, September 12, 1991 hearing at 8. *See* Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution, supra*, at 612.

[40] Statement of the Honorable Warren W. Eginton, U.S. District Judge, District of Connecticut, February 22, 1990 hearing at 5.

[41] Statement of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, April 5, 1990 hearing at 9.

[42] McQuire, The Conference Board, Research Report No. 908, *The Impact of Product Liability* (1988), Table 28, pg. 19 [hereinafter Conference Board Report].

[43] Conference Board Report, Table 29, pg. 19.

[44] Statement of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, April 5, 1990 hearing at 5.

[45] *The Liability Maze*, Huber and Litan, Overview at 19. Commentators in three of the four industries concluded that product liability deterred innovation. *E.G.* Mackay, *Liability, Safety, and Innovation in the Auto Industry*, at 220–221 (Discussions with executives and engineers point to conclusion that strict liability has had a negative influence on innovation.); Lasagna, *Chilling Effect of Product Liability* at 355 (The magnitude and uncertainties involved in product liability litigation serve to discourage certain kinds of pharmaceutical research, development and marketing); Robert Martin, *General Aviation Manufacturing: An Industry Under Seige* at 496 (Product liability litigation has had a deterring effect on innovation and product improvement at various levels within the industry).

[46] Statement of the Honorable Robert A. Mosbacher, Secretary, U.S. Department of Commerce, April 5, 1990 hearing at 4.

[47] Statement of Howard H. Fark, February 22, 1990, at 2.

[48] Statement of Richard Kingham, at April 5, 1990 hearing, *citing*, AMA Board of Trustees, "Impact of Product Liability on the Development of New Medical Technologies," at 12 (June 1988) in *Brief of Amici Curiae* Pharmaceutical Manufacturer Association and American Medical Association in *Browning Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[49] *Id.* at 1.

[50] *The Liability Maze* at 343.

[51] The General Aviation Accident Liability Standards Act of 1989, S. 640, Senate Committee on Commerce, Science, and Transportation, 101st Congress, 1st Session, Rept. No. 101–223, 1–3 (1989). *See also* Statement of Robert Martin, Counsel, Beech Aircraft Corp., Witchita, Kansas, before the Senate Judiciary Committee, March 9, 1990.

[52] Robert Martin, "General Aviation Manufacturing: An Industry Under Siege," in *The Liability Maze* at 496.

[53] Statement of Secretary Mosbacher, September 12, 1991 hearing at 6.

[54] Statement of Dr. Malcolm Skolnick before the Consumer Subcommittee of the Senate Committee on Commerce, Science, and Transportation, April 5, 1990 at 11. During the 101st Congress, there was considerable discussion about Monsanto Corporation's experience with a biodegradable phosphate fiber. Monsanto asserted that this substance could have been a safe substitute for asbestos. Testimony of Monsanto Company (S. Hrg 101–733) at 633. At the May 10, 1990 hearing, this claim was challenged by a witness testifying in opposition to the bill. *Id.* at 427. The witness submitted documents suggesting that the results of the intrapleural implant study with Monsanto's calcium sodium metaphosphate fiber presented a substantial risk that pleural fibrosarcomas might develop. Monsanto responded to this charge with a document indicating that independent experts concluded that the results could not be used as a basis for judging the effects on humans. *Id.* at 427. Moreover, the witness admitted under cross examination that there was a subsequent test of the Monsanto fiber. *Id.* at 503. This test, a chronic inhalation study, has found no evidence of carcinogenicity.

[55] Testimony of Dr. Malcolm Skolnick, *supra*.

[56] "The Chilling Effect of Product Liability on New Drug Development," in *The Liability Maze* at 355.

[57] *Id.* at 337.

[58] Martin, *supra*, at 492.

[59] *Id.*

[60] Mackey, "Liability, Safety, and Innovation in the Automotive Industry" in *The Liability Maze* at 220–21.

[61] Statement of the Honorable Robert A. Mosbacher, April 5, 1990 hearing at 9.

[62] The Conference Board Research Report at 4 (citing a 1984 study commissioned by the Department of Commerce).

[63] *Id.*

[64] *See* Orban, *Product Liability and International Trade and Policies*, Product Liability and Tort Law Reform, National Legal Center for the Public Interest, 144 (April 21, 1982).

[65] Letter from James A. Gray, President, National Machine Tool Builders Association, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 14, 1982). The letter also points out the effect of the lack of a statute of repose on this industry. NMTBA indicates there are cases in which 50 year old products have been the subject of product liability lawsuits.

[66] Testimony of Aaron Twerski, September 12, 1991 hearing (transcript at 134); *See Pray v. Lockhead Aircraft Corp.* 644 F. Supp. 1289 (D.D.C. 1986) (Washington, D.C. law applied in lawsuit against U.S. manufacturer for damages arising outside Saigong, Vietnam).

[67] Statement of Aaron Twerski, September 12, 1991.

[68] *Id.*

[69] *Id.*

[70] Statement of the Association of Trail lawyers of America before the Senate Committee on the Judiciary, July 31, 1990, S. Hrg. 101-1188 at 109; Statement of Gene Kimmelmann, Legislative Director, Consumer Federation of America, S. Hrg 101-743 at 304.

[71] *Id.*

[72] *See The Liability Maze* at 12-13.

[73] "General Aviation Manufacturing: An Industry Under Seige" in *The Liability Maze* at 492.

[74] "Product Liability and Motor Vehicle Safety" in *The Liability Maze* at 183-184.

[75] *Id* at 184.

[76] Statement of Professor Nicholas Ashford, September 12, 1991 hearing; *The Liability Maze* at 367.

[77] Testimony of Peter Huber, September 19, 1991 hearing (transcript at 94).

[78] *Id.*

[79] Letter of Professors Nicholas Ashford and Robert Stone to Senator Ernest F. Hollings, October 1, 1991 (in Committee files).

[80] Statement of Professor Nicholas Ashford, September 12, 1991 hearing at 2.

[81] Ashford and Stone, "Liability, Innovation, and Safety in the Chemical Industry," in *The Liability Maze* at 380.

[82] Statement of Aaron Twerski, September 12, 1991 hearing at 13.

[83] *Id.* at 2.

[84] *Id.* at 13.

[85] 43 Fed. Reg. 14612 (April 6, 1978).

[86] 44 Fed. Reg. 62714 (October 31, 1979).

[87] ALI Reporters' Study (Vol. I) at 97.

[88] Statement of the Honorable Jim Edgar, September 12, 1991 hearing at 3-4.

[89] Statement of the Honorable Wendell L. Wilkie II, General Counsel, U.S. Department of Commerce, February 22, 1990 hearing, at 10. It has been estimated that 30.5 percent of manufactured goods are consumed in the manufacturing state. *See*, 1977 Census of Transportation, Commodity Transportation Survey, Summary, U.S. Dept. of Commerce, Bureau of the Census, 1-77 (1981); American Bar Assoc. Section of Corporation, Banking and Business Law, Report to the House of Delegates, Attachment B. (1982). *See generally* Statement of Randolph J. Stayin on behalf of the American Textile Machinery Association, Product Liability Act: Hearing before the Subcommittee on Consumer of the Senate Committee on Commerce, Science, and Transportation, 99th Cong., 1st Sess., Rept. No. 99-84, 170 (1985).

[90] Several State governors have recognized this in vetoing proposed product liability legislation. *See, e.g.*, Schwartz and Bares, *Federal Reform of Product Liability Law: A Solution That Will Work*, 13 Cap. U.L. Rev. 351, 355 (1984).

[91] Statement of the Honorable Jim Edgar, *supra*, at 2.

[92] New York State Governor's Advisory Commission on Liability Insurance, Insuring Our Future, Vol. II, 113 (July 1, 1986).

[93] U.S. Const., Art. I, sec. 8, cl. 3.

[94] Congress preempted state tort reform to promote the nuclear power industry. *See Duke Power Co. v. Carolina Environmental Study Group*, 439 U.S. 59 (1978). *See also* Public Utility Housing Company Act of 1935, 15 U.S.C. sec. 79 et seq. (activities involved "not susceptible of effective control by any State"; United States Cotton Standards Act, 7 U.S.C. sec. 51 et seq. (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. sec. 1331 et seq. (national standards essential in order that "commerce and the national economy * * * not (be) impeded by diverse, nonuniform regulations"); Federal Employers' Liability Act, 45 U.S.C. 51 et seq.

[95] U.S. Const., Art. VI, cl. 2.

[96] Statement of the Honorable Wendell L. Wilkie, II, February 22, 1990 hearing at 10.

[97] *See* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L.J. 1521, 1535 (1987); *see also Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944) (en banc) (Traynor, J., concurring); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099 (1960).

[98] *E.g.*, Final Report of the Task Force on Product Liability, 1 vol. (May 1977); Legal Study, 7 vols. (March 1977); Insurance Study, 1 vol. (March 1977); Industry Study, 2 vols. (April 1977).

[99] Final Report of the Task Force on Product Liability at I-26 (May 1977).

[100] Options Paper on Product Liability, 43 Fed. Reg. 14612, 14624 (April 6, 1978).

[101] Now Is the Time for Product Liability Reform, Vice President Dan Quayle, *Product Safety & Liability Reporter*, The Bureau of National Affairs, Inc., Vol. 18 No. 12, March 23, 1990 at 307.

[102] Statement of the Honorable Robert A. Mosbacher, September 12, 1991 hearing.

[103] 132 Cong. Rec. S5106.

[104] Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February, 1986).

[105] 132 Cong. Rec. S5874.

[106] 132 Cong. Rec. S6232.

[107] The bill does not alter, modify, change, or preempt State laws governing who may be a "claimant." For example, state statutes stating who may bring a wrongful death or survival action are not affected by the bill. Such persons, if authorized by State law to bring the action, are "claimants" under the bill.

[108] *See, Hobson v. Eaton*, 399 F.2d 781 (6th Cir. 1968), cert. denied 394 U.S. 928 (1969). *See also* 30 Am.Jur.2d Evidence Sec. 1167 (1967).

[109] *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971).

[110] McCormick, Handbook on the Law of Damages 318 (1935).

[111] Restatement (Second) of Torts, Sec. 283, comment b (1965).

[112] *The Baltimore Football Club, Inc. v. Lockheed Corp.*, 525 F. Supp. 1206 (N.D. GA. 1981); *Industrial Uniform Rental Co. v. Int'l Harvester Co.*, 463 A.2d 1085 (Pa. Super. 1983); *Noorman Mfg. Co. v. National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982; *Superwood Corp. v. Siempelkamp Corp.*, 311 N.W. 2d 159 (Minn. 1981).

[113] 63 Cal. 2d 9, 403 Pacific 2d 145, 45 Cal. Rptr. 17 (1965).

[114] 476 U.S. 856 (1980).

[115] *See* Note, *Economic Loss in Product Liability Jurisprudence*, 66 Colum. L. Rev. 927 (1966).

[116] At the September 12, 1991 hearing before the Consumer Subcommittee, questions were raised about whether this legislation affected lawsuits brought by manufacturers to cover commercial loss. Statement of Senator Ernest F. Hollings, September 12, 1991 hearing, (transcript at 10–11). This legislation is not a broad-ranging reform of the civil justice system. Rather, it preempts only product liability law in areas addressed by the bill. Therefore, it does not affect lawsuits that would address commercial law under the Uniform Commercial Code or contract law, but only product liability law. Cases involving commercial loss would continue to be governed by the Uniform Commercial Code or contract law.

[117] "Person" is defined in section 102(11).

[118] "Product" is defined in section 102(13).

[119] *E.g., Mechanical Rubber & Supply Co. v. Caterpillar Tractor Co.*, 80 Ill. App. 3d 262, 399 N.E. 2d 722 (1980). *See also New Mexico v. Gatham-Matotan Architects and Planners, Inc.*, 98 N.M. 740, 653 P. 2d 166 (1982).

[120] "Product seller" is defined in section 102(14).

[121] *See, e.g., Green v. City of Los Angeles*, 40 Cal. App. 3d 819, 115 Cal. Rptr. 685 (1974) (seller of crane liable for harm caused by defects in the crane created by the seller's modifications; given the modifications made by the seller, it was "tantamount to a manufacturer").

[122] Restatement (Second) of Torts Section 400 (1965). *E.g., Smith v. Regina Mfg. Corp.*, 396 F. 2d 826 (4th Cir. 1968); *Carter v. Joseph Bancroft & Sons Co.*, 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody v. Sears, Roebuck & Co.*, 324 F. Supp. 844; (S.D. Ga. 1971).

[123] *See* 30 Am. Jr. 2d Evidence Section 1164 (1967); Cleary, McCormick on Evidence section 339 (3d ed. 1984).

[124] Human tissue, blood, and organs are generally used pursuant to medical treatment. Claims for harms caused by these substances are, in the view of most courts, claims for negligently performed services. In the past, however, a few states have held that the law of product liability is applicable to harms caused by such substances, and this act does not prevent them from doing so. *See, e.g., Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E. 2d 897 (Sup. Ct. 1970) (overturned by Ill. Ann. Stat. Ch. 111 ½, sections 2 and 3). In those states which do not recognize such substances as products, the law with respect to such harms will not be changed. In states that do extend such recognition, suits for harm caused by such substances, which are brought under a theory of product liability would be governed by the provisions of this bill. *See generally Prod. Liab. Rep.* (CCH) Paragraph 1187.

[125] *E.g.*, Restatement (Second) of Torts Sections 353, 385 (1965) (providing standards of care for builders, contractors, and sellers of real estate).

[126] W. Prosser and W. Keeton, Torts (5th ed.) 1984 at 719–20.

[127] *See., e.g., Carmichael v. Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bichler v. Willing*, 58 App. Div. 2d 331, 397 N.Y.S.2d 57 (1977); *Barbee v. Rogers*, 425 S.W. 2d 342 (Tex. 1968); *Magrine v. Krasnica*, 94 N.J. Super. 228, 227 A. 2d 539 (1967), *aff'd* 100 N.J. Super. 223, 241 A 2d 637 (1968), *aff'd* 53 N.J. 259, 250 A.2d 129 (1969).

[128] Schmidt & Derman, *The Constitutionality of Federal Products Liability/Toxic Tort Legislation*, 6 J. Prod. Liab. 171, 184 (1983). *See also Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 93 (1978), where the Court held that preemption of state tort law in order to promote the nuclear power industry is permissible under the Commerce Clause and does not violate the Fifth Amendment. In reaching this decision, the Court also rejected a challenge under the Equal Protection Clause.

[129] The effect of the bill on State law is the same as the effect, for example, of the Federal Employers' Liability Act on the law applied in actions involving injuries to railroad employees. 45 U.S.C. Sections 51 et seq. (1982). *E.g., Urie v. Thompson*, 337 U.S.C. 163, 174 (1949); *Brown v. Cedar Rapids and Iowa City Ry. Co.*, 650 F. 2d 159, 161 (8th Cir. 1981); *Isgett v. Seaboard Coast Line R. Co.*, 332 F. Supp. 1127 (D.S.C. 1971).

[130] U.S. Const. art. I, Section 8, cl. 3.

[131] The Commerce Clause power extends to interstate and intrastate activities which affect interstate commerce. *See e.g., Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) (discussion of scope of Commerce Clause); *Fry v. United States*, 421 U.S. 542 (1976); *Katzenbach v. McClung*, 379 U.S.C 294 (1964); *Wickard v. Filburn, 317 U.S. 111 (1942).*

[132] U.S. Const. art. VI, cl. 2.

[133] *E.g.*, Longshoremen's and Harbor Workers's Compensation Act, 33 U.S.C. Sections 901 et seq. (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. Section 2210 (limiting liability for nuclear power plant accidents); Federal Employers' Liability Act, 45 U.S.C., Sections 51 et seq. (governing the liability of interstate railway carriers to their employees and altering State tort law on available defenses).

[134] *Dice v. Akron, Canton & Youngstown R.R. Co*, 342 U.S.C. 359 (1952) (Federal Employers' Liability Act). In addition when there is a variance between State and Federal law, "incompatible doctrines of local law must give way to principles of federal . . . law"; *Local 174, Teamsters,*

Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co., 369 U.S. 95, 102 (1962) (National Labor Relations Act).

[135] For example, the provisions of the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq. are not affected by the act.

[136] This Act provides: " '[E]nvironment' means (A) the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the exclusive management authority of the United States under the Fishery Conservation and Management Act of 1976, and (B) any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States."

[137] Section 1332 of title 28, United States Code, establishes Federal district court jurisdiction in cases involving diversity of citizenship.

[138] Statement of Professor James Henderson, September 19, 1991 hearing at 3.

[139] Statement of J. Kendall Few, September 19, 1991 hearing.

[140] Statement of Professor James Henderson, September 19 at 4-5.

[141] McIver and Kerlitz, *Court-Annexed Arbitration*, The Justice System Journal, Volume 14, Number 2 at 123 (1991).

[142] *Id.*

[143] *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (1979). *Cf. United Farm Workers National Union v. Babbitt*, 449 F.Supp. 449 (1978) where the court held that a mandatory arbitration program that is binding violates the Seventh Amendment.

[144] McIver and Kerlitz, *supra*, at 127, 130.

[145] F.R.C.P. 68; See Section 201, *supra*.

[146] *Colaruso v. Peterson*, 812 P.2d 862 (Wash. App. 1991); *Christian-Lembert Van and Storage Co. v. McLeon*, 693 P.2d 161 (Wash. App. 1984).

Article 1, section 21 of the Washington Constitution provides: "The right of a trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto."

[147] Product seller is defined in section 102(14).

[148] W. Prosser and W. Keeton, Torts (5th ed.) 1984 at 705. (This rule extends strict liability to product seller: "[A]ll states would accept the proposition that strict liability extends . . . to one who vouches for the manufacturer-assembler by selling a product assembled by another as his own. *Id. See also* P. Sherman, Product Liability at 234.

[149] *E.g., Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P. 2d 168, 37 Cal. Rptr. 896 (1964).

[150] *See, e.g.*, Ark. Stat. Ann. Section 16-116-107; Ariz. Rev. Stat. Ann. 12-684.

[151] *See, e.g., Hales v. Monroe*, 544 F. 2d 331 8th Cir. 1976); *Litton Systems Inc. v. Shaw's Sales & Services, Ltd.*, 119 Ariz. 10, 579 P.2d 48 (1978); *Fairburn v. Montgomery Ward & Co.*, 349 So.2d 1280 (La.App.1977); *Anderson v. Somberg*, 158 N.J. Super. 384, 386 A.2d 413 (1978) *cert. denied*, 77 N.J. 509, 391 A.2d 522 (1978).

[152] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results, 35 (1977).

[153] *E.g., Kelly v. Hanscom Bros.*, Inc., 231 Pa. Super. 357, 331 A.2d 737, 740 (1974). ("It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays . . .").

[154] *Piedmont Equipment Co. v. Eberhard Mfg. Co.*, 665 P.2d 256, 259 (Nev. 1983) (holding that a product seller, absolved of liability in a products case, may seek indemnification from the responsible manufacturer for his legal costs).

[155] *See, e.g., Sam Shainberg Co. v. Barlow*, 258 So.2d 242, 246 (Miss. 1972) ("[I]t would not be reasonable, logical or practical to place on every retail merchant the absolute duty of inspecting for latent defects in every article ... . that the retailer might offer for sale. Such a rule of law would make each retail merchant an insurer or guarantor of every one of the thousands of items he handles merely as a sales conduit.")

[156] *E.g.*, Colo. Rev. Stat. Section 13-21-402 (Supp. 1984), Idaho Code Section 6-1407 (Supp. 1985); N.C. Gen. Stat. Section 99B-2 (1985).

[157] *See Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 171, 37 Cal. Rptr. 896 (1964) ("the retailer may be the only member of that enterprise reasonably available to the insured plaintiff").

[158] Statement of Professor Aaron Twerski, September 12, 1991 hearing at 12-13. (It is unfair to keep defendants who are in no way responsible for the harm in a case: it serves only to increase transition costs. *Id.*)

[159] *See* Ky. Rev. Stat. Section 411.340 (Supp. 1984); Tenn. Code Section 29-28-106 (Supp. 1985). *See also Brady v. Steyr-Daimler-Puch, A.G.*, 429 So. 2d 1348 (Fla. App. 1983) (summary judgment for distributor who shipped product in sealed container to dealer).

[160] *See, e.g., Kirby v. Rouselle Corp.*, 108 Misc. 2d 291, 437 N.Y.S. 2d 512 (1981); *Canifax v. Hercules Powder Co.*, 237 Cal. Appl. 2d 44, 46 Cal. Rptr. 552 (1965).

[161] Statement of Professor Twerski, *supra*.

[162] *See* Restatement (Second) of Torts Section 908(1) (1965).

[163] Punitive damages not permitted in Louisiana, *e.g., Ricard v. State*, 390 So. 2d 882 (La. 1980); Massachusetts, *e.g., Caperci v. Huntoon*, 397 F.2d 799 (1st Cir.) (dictum), cert. denied, 393 U.S. 940 (1968); Nebraska, *e.g., Abel v. Conover*, 104 N.W. 2d 684 (Neb. 1960); and Washington, *e.g., Kammerer v. Western Gear Corp.*, 96 Wash. 2d 416, 618 P.2d 1330 (1980) New Hampshire, *e.g.*, N.H. Rev. Stat. Ann. Section 507:16 (Supp. 1988). Other States put some limits on the allowance of punitive damages, for example, in breach of contract or wrongful death actions.

[164] *See* J. Chiardi & Kircher, "Punitive Damages—Law and Practice," Section 5.01 at 8 (1981), Ellis, "Fairness and Efficiency in the Law of Punitive Damages," 56 S. Cal. L. Rev. 1,38 (1982);

Owen, "Problems In Assessing Punitive Damages Against Manufacturers of Defective Product," 49 U. Chi. L. Rev. 1, 21 (1982).

[165] *See, e.g.*, Ala. Code Section 6-11-20(a) (Supp. 1989); *Linthizum v. Nationwide Life Ins. Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (en banc). *See also* Colo. Rev. Stat. Section 13-25-127 (2) (1973) (proof beyond reasonable doubt).

[166] American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 16 (March 3, 1989).

[167] The Alliance of American Insurers' continuing series of studies of large (over $100,000) product liability claims found that in 1975 punitive damages were sought in only 5 percent of product liability cases; by 1979, they were being sought in 18 percent of cases. AAI Survey of Large-Loss Product Liability Claims (1980) at iii. The Rand Institute for Civil Justice study found that the average punitive damage award in personal injury cases in Cook County, Illinois increased from $40,000 to $1,152,174 in 1980-84. *See* Peterson, Punitive Damages: Preliminary Empirical Findings, Rand Corp. N-2342-ICJ at 25 (1985), cited in Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability at 39-43 (1986). (These figures were adjusted for inflation and are stated in 1984 dollars.) *See generally* Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133 (1982); Owen, *Problems in Assessing Punitive Damages Against Manufacturer of Defective Products*, 49 U. Chi. L. Rev. 1 (1982). Two witnesses at the hearing on S. 640 testified that punitive damages awards are rare, and when awarded, they are not excessive. Statement of Stephen Daniels, the American Bar Foundation, September 12, 1991 hearing; statement of Professor Michael Rustad, September 19, 1991 hearing. Professor Rustad's data indicate that in 1969-70, there were no punitive damage awards in product liability cases, but in 1984, there were over sixty awards. Statement of Professor Michael Rustad at 6. Punitive damage awards in product liability cases, including asbestos cases, continued to increase in number through 1989-90. Between 1960 and 1989, punitive damages were awarded in a total of 355 product liability cases. Punitive damage awards in non-asbestos cases were far more frequent in 1989-90 than in 1969-70. *Id.* According to Professor Rustad, the average punitive damage award in product liability cases is $625,000. *Id.* at 6. It should be noted, however, that median awards are far lower than "mean" awards, indicating that there is a subset of very large awards that account for a large percentage of total punitive awards. ALI study at 234 (Vol. II).

The problem that this provision attempts to address is the appropriate standards by which punitive damages are awarded. Statement of Professor Aaron Twerski, September 12, 1991 hearing at 6. According to Professor Twerski, "'To inject punitive damages blithely, without carefully limiting the occassions in which courts may impose them, threatens the entire structure of product liability litigation." *Id.* at 6. The ALI Reporters' Study agreed, stating, "defendants always face the risk that . . . juries will second-guess decisions that seemed entirely appropriate at the time they were made . . . (This is) probably unnecessary when the issue is whether to add . . . a punitive component." ALI Reporters' Study (Vol. II) at 247. Section 303 provides the needed standards by creating a "floor" standard so that manufacturers and product sellers will understand what standard of conduct they must meet in order to avoid punitive liability. Testimony of Professor Aaron Twerski, September 12, 1991 hearing (transcript at 127). *See also* Testimony of Professor Kathryn Kelly, September 19, 1991 hearing (transcript at 120-21) (enactment of S. 640 will enhance uniformity in the awarding of punitive damages by ensuring that those states that allow them do so in a rational and predictable way).

[168] American College of Trial Lawyers Report at 6, 16.

[169] Twerski, *supra*, 18 U. Mich. J. of L. Ref. 575, 612.

[170] Statement of Professor Michael Rustad, *supra*, at 7; GAO Report at 42.

[171] September 19, 1991 hearing (transcript at 114-115).

[172] Compliance with a federal, state or local government safety standard is not generally a defense of any sort in a product liability action; however, four state statutes do provide for consideration of compliance with government standards as a defense in product liability actions. In Utah, Colorado, Tennessee, and North Dakota, such compliance establishes a rebuttable presumption as to the safety of the product. In New Hampshire, such compliance is one element of an affirmative defense. *See* Utah Code Ann. 78-15-6(3); Colo. Rev. Stat. 13-21-403(1)(b); Tenn. Code Ann. 29-28-104; N.D. Century Code 28-01-05(3); N.H. Rev. Stat. Ann. Ch 507-D:4.

[173] *See, e.g.*, Huber, "Safety and the Second Best: The Hazards of Public Risk Management in the Courts," 85 Col. L. Rev. 277 (1985); *The Bhopalization of U.S. Tort Law*, Issues in Science and Technology, Fall 1985.

[174] *Johnson v. American Cyanamid Co.*, Eighteenth Judicial District for the District of Sedgwick County, Kansas, June 1984, reversed, Kan. Sup Ct., No. 57,369. The Kansas Supreme Court reversed by a narrow 4-3 margin, and did not reach the government standards issue.

[175] Edmund W. Kitch, *Vaccines and Product Liability: A Case of Contagious Litigation, Regulation*, May/June 1985, at 15.

[176] 111 S.Ct. 1032 (1991) at 1043. The Court indicated in this case that the Due Process Clause limits states' ability to impose punitive damages. Statement of Professor Kathryn Kelly, September 19, 1991 hearing at 5.

[177] Statement of Professor Kathryn Kelly, *supra*, at 6. The ensuing discussion will reveal that the Court noted agreement with principles concerning punitive damage awards that resemble section 303's provisions.

[178] *Id.* at 11.

[179] *Id.* at 8. *Haslip*, 111 S. Ct. at 1046, n. 11.

[180] *See* American Bar Association Action Commission to Improve the Tort Liability System, Report to the House of Delegates: Recommendations to Improve the Tort System (adopted FEB. 1987) [hereinafter ABA Action Commission Report]; American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice*, 18-

19 (March 3, 1989) [hereinafter American College of Trial Lawyers Report] ALI Reporters' Study (Vol. II) at 264.

[181] Colo. Rev. Stat. Section 13-25-127(2) (Supp. 1979).

[182] The ALI Reporters' Study states that the standard should be "reckless disregard for the safety of others." ALI study (Vol. II) at 264; *See* W.P. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser and Keeton on Torts 214 (5th ed. 1984); Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1368-69 (1976); Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 20-28 (1982); Owen, Civil Punishment and the Public Good, 56 So. Cal. L. Rev. 103, 116 (1982) ("Punishment becomes appropriate [only] at an 'extreme' distance from the norm, where the conduct has become clearly flagrant").

[183] Statement of Professor Kathryn Kelly, *supra*, at 7.

[184] Owen, *supra* note 173, 49 U. Chi. L. Rev. at 27-28. *See Laney v. Coleman Co.*, 758 F.2d 1299 (8th Cir. 1985) (reversing punitive damages award); *Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779 (8th Cir. 1984)(same). *See also* American Motors Corp v. Ellis, 403 So.2d 459, 469 (Fla. App. 1981) (Cowart, J., dissenting in part) ("Even assuming that the AMC engineers were wrong in these determinations, at most that could only amount to negligence, not the malicious refusal to implement a 'safer' design required to support an award of punitive damages."); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582, 598, 602 (Tex. App. 1982) (Gonzalez, J., dissenting) ("there is no evidence that Ford was consciously indifferent to appellees' rights"); *American Cyanamid Co. v. Roy*, 466 So.2d 1079, 1085 (Fla. App. 1984) (Amstead, C.J., dissenting in part on rehearing) ("The facts simply do not reflect the kind of flagrant misconduct that would justify" punitive damages).

[185] Owen, *supra*, 49 U. Chi. L. Rev. at 38.

[186] *Id.* at 16, 24.

[187] *See Roth v. Black & Decker, U.S., Inc.*, 737 F.2d 779 (8th Cir. 1984) ("the evidence must show that the defendant was aware that its acts were wrongful in some way"); Prosser and Keeton on Torts *supra* note 1, at 214 n.62 ("a consciousness that the conduct is unlawful or morally wrong"); R. Epstein, *Modern Products Liability Law* 181 ("defendant knew that the conduct was wrongful").

[188] "Clear and convincing evidence" is defined in section 102(2). "Preponderance of the evidence" is defined in section 102(12).

[189] *See* Owen, "Crashworthiness Litigation and Punitive Damages," 4 J. Prod. Liab. 221, 226 (1981).

[190] Uniform Product Liability Act Section 120, 44 Fed. Reg. 62714, 62748 (1979).

[191] Wheeler, "The Constitutional Case for Reforming Punitive Damage Procedures," 69 Va. L. Rev. 269, 298 (1983).

[192] *See* Ala. Code 6-5-410 (1975).

[193] *Cf.*, Federal Tort Claims Act, 28 U.S.C. Section 2674 (1982).

[194] ALI Reporters' Study (Vol. II) at 101; *The Liability Maze* at 21.

[195] The five states are Arizona, *e.g.*, Ariz. Stat. Ann. Section 12-701; New Jersey, *e.g.*, N.J. Stat. Ann. Section 2A:58C-5(c); Ohio, *e.g.*, Ohio Rev. Code Ann. Section 2307.80; Oregon, *e.g.*, Or. Rev. Stat. Section 30.927; Utah, *e.g.*, Utah, *e.g.*, Utah Code Ann. Section 78-18-2.

[196] Testimony of Richard Kingham, May 10, 1990 hearing.

[197] This provision does not apply to medical devices that were never subsject to pre-market approval by the FDA, such as the intrauterine device known as the Dalkon Shield, which was taken off the market before FDA pre-market regulation of medical devices began in 1976. *See* Report on H.R. 11124, Medical Devices Amendments of 1976, H. Rep. No. 94-853, 94th Cong., 2nd Sess. 8 (1976).

[198] In the case of drugs and medical devices, Section 505 of the Federal Food, Drug and Cosmetics Act provides that a drug must be "safe and effective." Moreover, these products are generally evaluated on a risk-benefit basis. *See* Report Prepared by the Subcommittee on Science, Research, and Technology, "The Food and Drug Administration's Process for Approving New Drugs," 96th Congress 2nd Sess. (Committee Print 1980) at 21; Merrill, *Compensation for Prescription Drug Injuries*, 59 Va. L. Rev. 8-10 (1973); In the case of aircraft, section 601 of the Federal Aviation Act (FAA), directs the Secretary to "promote safety" of civil aircraft and to establish "standards governing the design, materials, workmanship, construction and performance of aircraft . . . in the interest of safety." Moreover, section 305 of the FAA Act directs the Secretary "to encourage and foster the development of civil aeronautics and air commerce." In the case of both of these products, the federal government is certifying the safety of these products for consumer use. *See also*: Testimony of Richard Kingham; Statement of Robert Martin, *supra*, note 42.

[199] ALI Reporters' Study (Vol. II) at 95.

[200] *Id.* (Vol. II) at 110.

[201] *See* ABA Action Commission Report; American College of Trial Lawyers Report at 15-16; ALI Reporters' Study (Vol. II) at 264.

[202] According to testimony received by the Committee, 30 percent of the lawsuits brought against machine tool manufacturers involve machines that are over 25 years old. As a result of the transaction cost associated with this litigation, this industry spends seven times as much on product liability cases as on research and development. Testimony of Howard H. Fark, February 22, 1990 hearing.

[203] Under present law, different statutes of limitations apply in product liability actions depending upon the particular theory of the case. For example, a statute of limitations applicable in tort may be the rule in an action based on negligence while a statute of limitations applicable in contract may be the rule in an action based on breach of warranty. The act will establish one statute of limitations for all product liability actions.

[204] *See, e.g., Wojcik v. Almase*, 451 N.E. 2d 336 (Ind. App. 1983); *New Mexico Electric Service Co. v. Montanez*, 89 N.M. 278 (551 P. 2d 634 (1976); *Lange v. Bucyrus-Errie Co.*, 707 F.2d 94 (4th Cir. 1983).

[205] See, e.g., Conn. Gen. Stat. 52-577(a) (1983); *Witherall v. Weimer*, 52 Ill. 2d 146, 421 N.E. 2d 869 (1985); *Hansen v. A.H. Robins, Co.*, 113 Wis. 2d 550, 335 N.W.2d 578 (1983); *Hines v. Tenneco Chemicals, Inc.*, 546 F. Supp. 1229 (S.D. Tex. 1982).

[206] As one judge said, this follows the logic of "topsy-turvy land" where one can "be divorced before [he] ever . . . marr[ies], or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad." *Dincher v. Marlin Firearms Co.*, 198 F2d 821, 823 (2d Cir. 1952) (Frank J. dissenting).

[207] *See, e.g., Williams v. Borden, Inc.* 637 F.2d 731, 734 (10th Cir. 1980); *Nelson v. A.H. Robins, Co.*, 515 F. Supp. 623 (N.D. Cal. 1981); *Lundy v. Union Carbide Corp.* 695 F.2d 394 (9th Cir. 1982); *Fidler v. Eastman Kodak Co.*, 555 F. Supp. 87 (D. Mass. 1982) *aff'd*, 728 F.2d 729 (5th Cir. 1989).; *Mack v. A.H. Robins Co.*, 573 F. Supp. 149 (D. Ariz. 1983) *aff'd*, 759 F.2d 1482 (9th Cir. 1985); *Olsen v. Bell Telephone Laboratories, Inc.*, 388 Mass. 171, 445 N.E. 2d 609 (1983); *Elmore v. Owens-Illinois, Inc.*, 673 S.W. 2d 434 (Mo. Ct. App. 1983); *Sahlie v. Johns-Manville Sales Corp.*, 99 Wash. 2d 550, 663 P. 2d 473 (1983).

[208] "Statutes of repose for products currently exist in some form in at least 16 states. In all but one state, these statutes of repose apply to *all* products, and are not limited to capital goods." Ariz. Rev. Stat. Ann. Section 12-551; Ark. Stat. Ann. Section 34-2804(c); Colo. Rev. Stat. Section 13-80-107; Conn. Gen. Stat. Section 52-577; Ga. Code Ann. Section 51-1-11; Idaho Code Section 6-1403; Ill. Rev. Stat. ch. 110, para. 13-213(b); Ind. Code Section 33-1-1.5-5; Kan. Stat. Ann. Section 60-3303; Ky. Rev. Stat. Ann. Section 511.310; Mich. Comp. Laws Section 600.5805; Minn. Stat. Section 604.03; Neb. Rev. Stat. Section 25-224; Or. Rev. Stat. Section 30.905(1); Tenn. Code Ann. Section 29-28-103; and Wash. Rev. Code Section 7.72.060. None of these statutes of repose is limited to cases where the claimant is eligible to receive workers compensation benefits.

[209] *See, e.g.*, Ill. Stat. Ann. Ch. 110, 13-214(b) (1984) (claim is barred if harm occurred more than 12 years after the first sale, lease, or delivery, or ten years after the sale to the initial user, whichever is shorter); Or. Rev. Stat. Ann. 30.905(1) (Supp. 1985) (eight-year statute of repose).

[210] Statement of Professor James Henderson, September 19, 1991 hearing at 5.

[211] As defined in section 304(3)(c), "toxic harm" means harm which is functional impairment, illness, or death of a human being resulting from exposure to an object, substance, mixture, raw material or physical agent of particular chemical composition. Recovery for such harm is not impeded by the 250-year statute of repose for capital goods.

[212] *The Liability Maze* at 21.

[213] *See* Uniform Product Liability Act, sec. 110(B)(2)(C), 44 Fed. Reg. 62714, 62732-33 (1979).

[214] Statement of Professor Aaron Twerski, September 12, 1991 hearing at 10-11.

[215] ALI Reporters' study (Vol. II) at 191. The reforms contained in this section also have been advocated for many years by Professor Arthur Larson, a leading expert on workers compensation law. *See* testimony of Professor Larson, Hearings on S. 44 before the Subcommittee on Consumer of the Senate Committee on Commerce, Science, and Transportation, 98th Cong., 1st Sess., pp. 269-270 (1983) (Serial No. 98-302).

[216] A. Larson, 2A "The Law of Workmen's Compensation" Sec. 65.10 (1982). *See Kofron v. Amoco Chem. Corp.*, 441 A. 2d 226 (Del. 1982).

[217] Statement of Victor Schwartz, May 10, 1990 hearing, at 3.

[218] *E.g., Skinner v. Reed-Prentice Div.*, 70 Ill. 2d 1, 374 N.E. 2d 437 (1977), cert. denied, 426 U.S. 946 (1978); *Dole v. Dow Chem. Co.*, 130 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E. 2d 288 (1972).

[219] *Lamberton v. Cincinnati Corp.*, 312 Minn. 114, 257 N.W. 679 (1977).

[220] *E.g., Hammond v. Kolberg Mfg. Corp.*, 542 F. Supp. 662 (D. Colo. 1982); *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P. 2d 948 (1982); *Union Carbide Corp. v. Dunn Bros. Gen. Contractors*, 294 F. Supp. 704 (M.D. Tenn. 1968); *Jack Morgan Constr. Co. v. Larkan*, 254 Ark. 838, 496 S.W. 2d 431 (1973).

[221] In a hypothetical case, a claimant is entitled to $50,000 in workers' compensation benefits and sustains total damages of $500,000. The judgment against the defendant would be $450,000, calculated as follows: $500,000 total damages less $50,000 workers' compensation benefits. The claimant still receives a net total of $500,000 in compensation.

[222] ALI Reporters' study (Vol. II) at 147. The ALI Reporters' study proposes an "allocation" theory. This would require multiple defendants to pay damages in proportion to their fault. The portion of damages attributable to an insolvent defendant would be allocated to the plaintiff and all solvents defendants in proportion to their fault.

[223] *See* Statement of Alfred Cortese, May 10, 1990 hearing at 9-14, which provides a detailed history of the development of joint and several liability and indicates that the use of this doctrine has expanded well beyond its original intent.

[224] *Id.* at notes 37-39 and accompanying text.

[225] *Id.* at 16.

[226] *See* Prosser and Keeton on Torts, *supra*, section 52 at 348-351.

[227] *See* Uniform Comparative Fault Act, Section 2, 12 U.L.A. 39 (Supp. 1985); V. Schwartz, Comparative Negligence, *supra*, section 16.5 at 263-65.

[228] *See* note 222, *supra*.

[229] Wash. S.B. No. 4630, Sec. 902 (enacted March 10, 1986). The Washington Statute specifies that "If the amount of alcohol in a person's blood is shown by chemical analysis of his or her blood, breath, or other bodily substance to have been 0.10% or more by weight of alcohol in the blood, it is conclusive proof that that person was under the influence of intoxicating liquor."

[230] Wash. S.B. No. 4630, Sec. 100.

Rollcall Votes in Committee

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 640:

Senator Hollings offered an amendment regarding the reporting of insurance data. By a rollcall vote of 10 yeas and 10 nays as follows, the amendment was defeated:

YEAS—10	NAYS—10
Mr. Hollings	Mr. Exon
Mr. Inouye	Mr. Rockefeller
Mr. Ford	Mr. Bentsen [1]
Mr. Gore	Mr. Robb
Mr. Kerry [1]	Mr. Danforth [1]
Mr. Breaux	Mr. Pressler
Mr. Bryan	Mr. Kasten
Mr. Packwood	Mr. McCain
Mr. Stevens	Mr. Burns
Mr. Gorton	Mr. Lott

[1] By proxy.

At the close of debate on S. 640, the Chairman announced a rollcall vote on the bill as amended. On a rollcall vote of 13 yeas and 7 nays as follows, the bill was ordered reported:

YEAS—13	NAYS—7
Mr. Inouye	Mr. Hollings
Mr. Exon [1]	Mr. Ford
Mr. Rockefeller	Mr. Gore
Mr. Bentsen [1]	Mr. Kerry [1]
Mr. Robb [1]	Mr. Breaux
Mr. Danforth [1]	Mr. Bryan
Mr. Pressler	Mr. Packwood
Mr. Stevens	
Mr. Kasten	
Mr. McCain	
Mr. Burns	
Mr. Gorton	
Mr. Lott	

[1] By proxy.

Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

ADDITIONAL VIEWS OF SENATORS EXON AND LOTT

We voted to report S. 640 the Product Liability Fairness Act of 1991. However, we have grave concerns about the implications to employers, particularly small business employers, of Section 305 known as the workers' compensation offset provision. Unlike other sections of the bill, this section does not directly involve product liability lawsuits. Rather, section 305 involves the economic relations between employers and manufacturers in the aftermath of such lawsuits.

As it is still early in the legislative process for S. 640, we urge that section 305 be given close further scrutiny with the hope that the concerns of employers, can be addressed. If those concerns cannot be addressed, we would urge that section 305 be deleted from S. 640 in the interests of the overall legislation.

Our concerns are based on the fact that most State and Federal workers' compensation laws give employers the right to recover, through a subrogation lien, their workers' compensation expenses paid to employees injured by defective products, in cases where an injured employee successfully sues the product manufacturer. The benefit to employers of the system of workers' compensation subrogation liens under present laws is obvious. This system reduces the burden on the individual employer's workers' compensation costs, reduces the burden overall workers' compensation system, and thereby reduces the pressure for workers' compensation insurance rate increases. However, this system would change under section 305 of S. 640, except in those situations where the employer had the financial ability to pursue a lien through the litigation process in the courts.

Not surprisingly then, the business community is not united in support for Section 305. Many business groups have expressed reservations or opposition to this section, including the National Federation of Independent Businesses (NFIB), the Associated General Contractors of America (AGC), the American Subcontractors Association (ASA), the Shipbuilders Council of America, and the National Association of Stevedores (NAS).

We urge that these problems arising from Section 305 be satisfactorily addressed prior to Senate floor consideration of S. 640.

MINORITY VIEWS OF SENATORS HOLLINGS AND GORE

INTRODUCTION

In the past, we have urged our colleagues to reject Federal product liability laws as unwise Federal legislation. Since then, the proponents of this legislation have had many years to make their case, and they have completely failed to do so. After this extended examination of the facts, we believe that, not only is this legislation unwise, but to enact it would amount to a complete distortion of the proper legislative process.

This measure would federalize an area of law that always has been the province of the States. Such an action should never be undertaken lightly. Those who propose such dramatic change through the legislative process should, at a minimum, bear the burden of proving that such change is both warranted and likely to be effective. Unfortunately, the Committee has ordered this bill reported without requiring anything close to a demonstration that either factor is present. On the contrary, the factual record clearly demonstrates that each stated basis for this legislation cannot withstand even minimal scrutiny. What is deeply disturbing about this legislation is the total lack of verifiable, objective data which supports the proponents' claims.

In fact, the stated basis for this legislation is a constantly moving target. A new reason that this bill is necessary is suggested periodically, the facts are examined, and that reason evaporates when exposed to the light of day and to the objective facts.

Contrary to the claims of the bill's supporters, the Committee's work on this issue has demonstrated that (1) there is no litigation explosion, and the number of most kinds of product liability cases is decreasing; (2) the insurance crisis (which has now ended) was not due to product liability; (3) the current system generally works properly to fairly compensate injured victims; (4) the competitive position of U.S. business is affected very little, if at all, by product liability; and (5) products kept off the market by product liability concerns are not necessarily safe, innovative products, but rather are examples of the product liability system deterring unwarranted risks to consumer. Each of the issues discussed above has been the basis, over the years, for the almost frenzied cry for Federal product liability law, but none of them withstands scrutiny.

This year, "competitiveness" is the buzz word on which the legislation is based. We are asked to pass this legislation to make U.S. business more competitive in world markets. However, these are the facts: less than 1 percent of the price of products is attributable to product liability; the Office of Technology Assessment (OTA) does not list product liability as a primary problem for U.S. manufacturers competing in world markets; this bill will not reduce product liability claims or insurance costs; our competitors in the

European Community are moving toward a product liability system more like ours, which appropriately reflects the need for consumer protection; and the General Accounting Office (GAO) says that this bill will not reduce transaction costs, but could actually increase them. The facts show that product liability is not the cause of competitive problems, nor is this bill the cure.

This year the President's Council on Competitiveness, headed by Vice President Quayle, has added its voice to the fray. Using political rhetoric instead of objective reality, it has made unsupported or inaccurate claims about the civil justice system and particularly the costs of the tort system. The cost figures cited by the Vice President cite no credible authority and have no explanation for how they were calculated or what is included in the general term "tort costs." Yet those cost figures are the centerpiece of the Vice President's call for a major overhaul of the civil justice system. It is troubling that even the executive branch, like the business advocates of S. 640, would base its arguments for such a major change on unsubstantiated, arbitrary numbers.

The proponents of S. 640 have represented that this bill is not as draconian as earlier Federal product liability measures, and will not impact as drastically on consumers. First, it should be noted that, despite efforts to characterize this as a bill that will impact similarly on plaintiffs and defendants, it is written for the benefit of the business community, and in most areas changes only the laws of the States that currently favor plaintiffs. We should not misunderstand the purpose of this bill.

The current form of this bill gives us little comfort in any event, since the primary effect of this or any such measure would be to begin the federalization of product liability law. Once that process has begun, Congress will never hear the end of the clamor for additional changes in this law, and will be spending an ever-increasing portion of its working time on this issue. Moreover, the form of even this bill is not cast in stone until enactment into law, and the administration and others are already calling for more stringent amendments. In addition, many of the substantive provisions of this bill are unwise or unworkable and the bill is riddled with ambiguity and conflicts for court practice and procedure.

Supporters of this bill are fond of implying that its only enemies are trial lawyers. It is important to note who the opponents of this bill *really* are. It is opposed by every major consumer organization, a wide range of health organizations, the American Bar Association, the National Conference of State Legislatures, and the Conference of State Supreme Court Justices. Over 70 law professors from all over the country have written to the Committee in opposition to this bill, stating that it is "unwise, unfair and ill-conceived." (See letter to Chairman Hollings from Andrew Popper, Deputy Dean, Washington College of Law, dated September 27, 1991, reprinted in record of Consumer Subcommittee hearing on S. 640, September 19, 1991.) These are the experts in health, consumer protection, and legal jurisprudence. They are concerned not with fees, but with product safety, justice and the proper functioning of the legal system. So, it is not just the trial lawyers who are concerned about the bill's effects.

We are being asked to enact legislation when there has been no credible demonstration that there is a problem that will be addressed by that legislation. At the same time, enactment of such a law would alter, in one stroke, the fundamental federalism inherent in this country's tort law, and would add to the difficulties already faced by the victims of defective products.

We yield to no one in our desire to assist American business in every way, and to ensure its viability in ever-changing world markets. However, we urge our colleagues to insist, at a minimum, on some objective demonstration that Federal product liability law is a reasonable means to address the problems of the business community. We have not yet seen such a demonstration, and in our view the legislative process is ill-served by taking such dramatic action in these circumstances. Legislative proposals of this type have been much ado about nothing for over a decade, but the "much ado" has been a considerable drain on the limited resources of the Congress. We have very limited time, and we must insure that it is spent on work that can be most productive for the nation. It is time to recognize where the burden of proof on this issue lies, to recognize that it has not been met despite 10 years of work, and to turn the resources of the Committee and the Senate to work on other more useful matters.

In the discussion below, we will set out in more detail the facts that have been developed on this issue. These facts demonstrate why we should not move forward on this bill.

THERE IS NO FACTUAL BASIS FOR THIS LEGISLATION

I. The Current System Achieves Fair Results, and There Is No "Explosion" of Litigation

Before we make dramatic changes in the product liability law, we should, at the least, have information to demonstrate that the current system needs fixing—that it is not achieving its purpose of fairly and properly compensating victims of defective products, and of deterring the marketing of unsafe products. As each additional piece of objective data becomes available, it becomes more clear that the system is working. The number of nonasbestos product liability cases is actually declining, punitive damages are a rare occurrence, and the compensatory awards are reasonably related to the cost of the injuries involved.

Prof. Marc Galanter of the University of Wisconsin Law School has completed the most recent review of statistics from the Federal courts, and found that, if asbestos cases are excluded, the number of product liability cases in the Federal courts has declined in the last 5 years—from 8,268 cases in 1985 to 4,992 in 1991, a 40-percent decrease.[1] He points out that asbestos filings account for all recent increases in product liability filings, and that asbestos cases are quite distinct in that they involve a product of "unparalleled dead-

[1] Testimony of Professor Marc Galanter, Director, Institute of Legal Studies, University of Wisconsin Law School, before the Consumer Subcommittee September 19, 1991, transcript at 86-87. *See also* Galanter and Rogers, "A Transformation of American Business Disputing? Some Preliminary Observations," working paper #DPRP 10-3, Institute for Legal Studies, University of Wisconsin (April 1991).

liness to which there was massive exposure that continued long after the dangers of its use were suspected and suppressed." [2]

Moreover, the Rand Corp. this year issued a report reviewing the way in which victims of accidental injuries are compensated and found, contrary to popular belief, that only 10 percent of those injured ever use the tort system at all to seek compensation for their injuries.[3] The report further found that only 7 percent of all compensation for accident victims is paid through the tort system. The report concluded that "[m]ost Americans who are injured in accidents do not turn to the liability system for compensation. * * * In this respect, Americans' behavior does not accord with the more extreme characterizations of litigiousness that have been put forward by some." [4]

Similarly, the National Center for State Courts recently published updated statistics from State courts that reviewed civil court filings in 13 general jurisdiction State court systems from 1984–89. The Center concluded that "the most dramatic increases in the civil caseload tended to be for real property rights cases or contract cases, not torts." [5] These statistics showed that tort filings make up less than 1 percent of all cases filed in State courts, and less than 10 percent of most States' civil caseload. Product liability cases, which are a subset of tort cases, would make up an even smaller percentage of the total.[6]

As Professor Galanter also has found, the real increase in litigation in recent years has been business suing business, not consumers seeking compensation through product liability litigation. For example, contract filings in Federal courts increased by 232 percent between 1960–88, and by 1988 were the largest category of civil cases in the Federal courts.[7]

Additionally, GAO last year completed one of the first extensive reviews of data related to State court product liability cases.[8] Since most product liability cases are litigated in State court, and most of the past data has been only from the Federal courts, this report is very significant. GAO found that the size of compensatory awards varied by type and severity of injury in a manner consistent with underlying economic loss, so that compensatory awards were neither erratic nor excessive.[9] It further found that plaintiffs won fewer than 50 percent of the cases litigated, that awards were based on negligence in almost three-quarters of the cases (even in the States that permit recovery based on strict liability without a demonstration of negligence), and that the amount of punitive damages awarded was highly correlated with the size of compensatory damages.[10]

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[2] Galanter testimony, *supra*, transcript at 88.

[3] Hensler, et al., "Compensation for Accidental Injuries in the United States," Rand Corporation, Institute for Civil Justice (1991), Executive Summary at 18. *See also* testimony of Dr. Deborah Hensler, Consumer Subcommittee hearing on S. 640, September 12, 1991, statement at 6.

[4] *Id.*, Executive Summary at 18, 20.

[5] National Center for State Courts, "State Court Caseload Statistics: Annual Report 1989," (February 1991) at 46.

[6] State Court Caseload Statistics, *supra* n. 5, at 45–6.

[7] Galanter and Rogers, "A Transformation of American Business Disputing?," *supra.* at 1, 5–6.

[8] U.S. General Accounting Office, "Product Liability: Verdicts and Case Resolution in Five States," GAO/HRD–89–99 (September 1989). Hereafter referred to as "1989 GAO Report."

[9] *Id.* at 27.

[10] *Id.* at 29–31.

Another significant research effort concludes that, even if product liability cases could be characterized as unfairly favoring plaintiffs in the past, the current trend is clearly favoring defendants. Prof. James A. Henderson Jr. and Prof. Theodore Eisenberg of Cornell Law School performed an extensive study of all reported product liability decisions and found a "quiet revolution * * * away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs rights to recover in tort for product-related injuries." [11] Specifically, they found that in 1976 and continuing to 1983, defendants benefited in roughly 51 percent of product liability cases. By 1988, the figure had risen by 12.2 percent, so that defendants prevailed in 63.4 percent of product liability cases.

Similarly, GAO [12] and Rand Corp.[13] studies have indicated that, despite increases in absolute numbers of Federal product liability filings during the 1970s and 1980s, the data does not support the suggestion, made in past years, that there is an "explosion" of product liability cases from which business must be protected. Rather, GAO found that one product, asbestos, accounting for approximately 60 percent of the growth in filings between 1976–86.[14] GAO further found that, since 1981, product liability cases have grown at about the same rate as other civil filings and at the same rate as personal expenditures on goods, with growth of product liability cases at 4 percent, personal expenditures on goods at 4 percent, and civil filings at 6 percent.[15] The author of the Rand study has stated that "[m]y feeling is that the available evidence doesn't support the notion that products liability is crippling American business." [16]

Prof. Lawrence Mann from Wayne State University Law School performed a similar study for the Governor of Michigan in 1988–89. He began by noting that "* * * much of the debate surrounding products liability litigation has been based upon anecdote and intuition. Hard data describing the products liability litigation landscape are scarce." He conducted his research by surveying over 2,000 businesses as well as attorneys of record in closed cases for the year 1987. His general conclusion was that "[v]erdicts and settlements in products liability cases are not erratic and appear reasonably related to economic losses sustained and injury severity." [17]

His research found a "phenomenal concentration of litigation among a handful of defendants who are 'repeat players' in civil litigation." In 1987, four companies accounted for 92 percent of the

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[11] Henderson and Eisenberg, "The Quiet Revolution in Products Liability: An Empirical Study of Legal Change," 37 U.C.L.A. Law Review 479, 480 (1990).

[12] U.S. General Accounting Office, "Product Liability: Extent of 'Litigation Explosion' in Federal Courts Questioned," GAO/HRD-88-36BR (January 1988).

[13] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," Rand Corporation, The Institute for Civil Justice, R-3668-ICJ (1988).

[14] GAO Report, supra, note 12, at 32, 43.

[15] *Id.* at 32, 43.

[16] Wall Street Journal, "Survey Questions Liability Crisis at U.S. Companies," January 18, 1989.

[17] Testimony of Professor Lawrence C. Mann, Wayne State University School of Law, Consumer Subcommittee Hearing on S. 1400, February 22, 1990, statement at 1-2.

cases filed. In 1982, four companies accounted for 91 percent of the cases filed, and in 1979, four companies accounted for 83 percent.[18]

Professor Mann concluded that "* * * fewer and fewer litigants are accounting for an increasing share of the litigation pie." He further found that "* * * the distribution of cases filed for the years covered in the * * * survey yield a picture of products litigation that is inconsistent with the conclusion that the business community in general is the victim of a products liability explosion." [19]

Additionally, according to one study by the Insurance Services office approximately 73 percent of the bodily injury claims and 83 percent of the property damage claims are settled without the filing of a lawsuit. Only 3.5 percent of claims go all the way to a court verdict, and in these cases, fewer than 25 percent of defendants are found liable. Thus, according to this study, 96.5 percent of product liability claims are resolved before the verdict.[20]

Much has been made of the unpredictability of results in product liability trials. However, it has been recognized, as it must be, that most of this is due to our jury system.[21] We cannot believe any of our colleagues want to tamper with that system. When a product liability case goes to trial, the jury is not impaneled for the purpose of giving away someone else's money. Rather it is charged with the administration of justice. These juries are composed of our friends and neighbors, who conclude, some of the time, that the defective products involved and the injuries sustained require compensation. And it is our friends and neighbors—who work for a living and know the value of a dollar—who occasionally conclude that punitive damages are justified when the defendant has engaged in outrageous behavior.

In addition, with respect to punitive damages, the extent to which they are are awarded has been the subject of outrageous exaggeration. Much new data is available on punitive damages, which shows, among other things, that very few punitive damage awards have been made in all State and Federal product liability cases over the last 25 years. Punitive damages simply are not a factor in any but the rare product liability case, and have little effect on the business community. Dr. Stephen Daniels of the American Bar Foundation conducted a nationwide study of over 25,000 civil jury awards between 1981 and 1985. He concluded that the debate over punitive damages "changed in the 1980s as a part of an intense, well-organized, and well-financed political campaign by interest groups seeking fundamental reforms in the civil justice system benefiting themselves." He went on to state that this "politicization of the punitive damages debate * * * makes the debate more emotional and manipulative, and less reasoned. The reform-

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[18] *Id.*, at Report to the Governor of Michigan 2.

[19] *Id.* at Report to Governor 1, 2.

[20] See Insurance Services Office Product Liability Closed Claim Survey: A Technical Analysis of Survey Results at 95 (1977); 1986 Hearings on Product Liability, before the Consumer Subcommittee, 99th Cong. 2nd Session (Statement of the Public Citizen's Congress Watch, Consumers Union, U.S. Public Interest Research Group, Consumer Federation of America). Testimony on file at Senate Committee on Commerce, Science, and Transportation.

[21] See Testimony of Peter Huber, Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 119, 141; testimony of Professor Mark Hager, Consumer Subcommittee Hearing on S. 1400, April 5, 1990 transcript at 137.8.

ers appeal to emotions, fear, and anxiety in this political effort while avoiding reason and rational discourse." [22]

His review of the data on punitive damage awards found that punitive damages were not routinely awarded, were awarded typically in modest amounts, and were awarded more often in financial and property harm cases [business v. business] than in product liability cases.[23] His research also pointed up the errors in the data from Cook County, IL, and San Francisco, CA, which have in the past been used by supporters of bills like S. 640 as indicative of the nationwide pattern on punitive damages. He found that there were flaws in the method of data analysis used, and that it was inappropriate in any event to generalize from data in two counties to a nationwide trend.[24]

Dr. Daniels' findings were similar to those by Professor Michael Rustad of Suffolk University Law School and Prof. Thomas Koening of Northeastern University. They reviewed all product liability awards from 1965-90 in both State and Federal courts. During that time, punitive damages were awarded in only 355 cases—only 355 total punitive awards in 25 years! One-quarter of those awards involved one product—asbestos. Another one-quarter of those cases was reversed or remanded upon appeal. He further found that the amount of punitive damage awards were not skyrocketing, and in 35 percent of the cases in which punitive damages were awarded they were less than the amount of compensatory damages. He concluded that "[t]here is a widespread misperception that punitive damage awards are skyrocketing because of frivolous lawsuits * * *." [25]

By reviewing the data representative of the entire system, as opposed to the few anecdotes of high damage awards often cited by the supporters of this bill, we see that the system is not out of control in terms of numbers of cases filed or amount of compensation awarded. It also is important to note the beneficial aspects of the current system that stand to be undermined if this bill is enacted, as discussed below.

II. The Current System Promotes Product Safety

One of the primary effects of the current system is to promote product safety—to make manufacturers more careful in the design and production of their products. We know this because manufacturers themselves have told us. The 1987 Conference Board survey of risk managers of corporations found that "[w]here product liability has had a notable impact—where it has most significantly affected management decisionmaking—has been in the quality of the products themselves. Managers say products have become safer,

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[22] Daniels and Martin, "Myth and Reality in Punitive Damages," 75 Minn. Law Review 1, 10-12 (Oct. 1990). See also testimony of Dr. Stephen Daniels, Consumer Subcommitte Hearing on S. 640, September 12, 1991, transcript at 122.

[23] 74 Minn. L.Rev., *supra.* at 43.

[24] *Id.* at 22-27.

[25] Rustad and Koenig, "Demystifying the Functions of Punitive Damages in Products Liability: An Empirical Study of a Quarter Century of Verdicts," Executive Summary at 11-15, 1. *See also testimony of Professor Michael Rustad, Consumer Subcommittee Hearing on S. 640, September 19, 1991, transcript at 74-78.*

manufacturing procedures have been improved, and labels and use instructions have become more explicit." [26]

Indeed, according to the Consumer Federation of America (CFA), only a small minority of companies had a product safety management position in the early 1970s. By the end of the 1970s, virtually all companies had a very strong product safety presence in their management structure. CFA further stated that there has been a dramatic change in the rate of accidental injuries and deaths in the United States, so that "approximately 6,000 deaths and millions of injuries have been prevented on an annual basis now because of product liability and other forces toward greater safety in our society." [27]

Moreover, Professor Rustad in his survey of punitive damage awards found that 190 of the 252 nonasbestos defendants who were subject to punitive damage awards between 1969 and 1990 "have taken some safety step in the wake of punitive damages litigation. In 80 percent of these cases, there were steps such as fortified warnings, product withdrawals, and safety features added to products which followed shortly after the [litigation]." [28]

A similar finding was made by Prof. Nicholas Ashford and Prof. Robert Stone of MIT, in work done for inclusion in "The Liability Maze," and a collection of articles on product liability, innovation, and safety. This book is often mischaracterized by proponents of S. 640 as a monolithic study reaching results supportive of their position. Rather, it is a collection of research articles reaching various conclusions on the issue of innovation and safety in assorted industries.

Professors Ashford and Stone researched the effect of product liability on the chemical industry. They found that manufacturers pay "no more than 5 percent, and often less than 0.1 percent, of the corresponding social costs" of the chronic injuries caused by chemicals.[29] They concluded that, although the system is not stringent enough on the manufacturers to provide appropriate deterrence to prevent all unsafe products, it still has helped in the development of safer products. They recommend, however, that if the liability system were more, not less, stringent with respect to manufacturers it would be even more effective in promoting safety and innovation.[30]

The editor of "The Liability Maze," Peter Huber, has suggested that the work by Professors Ashford and Stone is somehow unique. However, Professor Ashford has responded that he and other authors of the book found it impossible to separate innovation and safety, and found that "the liability system can both promote safety and innovation of desirable products and discourage unsafe products though they may be innovative." Professor Ashford goes

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[26] "Product Liability: The Corporate Response," The Conference Board Report No. 893 (1987) at 2.

[27] Testimony of Gene Kimmelman, Legislative Director, Consumer Federation of America, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 77-78.

[28] Rustad, *supra*, executive summary at 28.

[29] Ashford and Stone, "Liability, Innovation, and Safety in the Chemical Industry," in *The Liability Maze* (Brookings 1991) at 414.

[30] *Id.* at 415-417.

on to state that "we believe most scholars would subscribe to our methodology * * *" [31]

The effect of product liability in promoting product safety relates not only to consumer protection, but to competitiveness. As Prof. Mark Hager of American University testified,

> * * * our products, because of their superior reputation for safety, due in part to the effects of product liability over the last 20 years, have a superior reputation in the international marketplace.* * * [W]e cannot compete at this time with the low labor costs of newly industrializing countries, but we can compete very effectively * * * in safety, and it would be a grave risk to our international competitiveness to toy with the tort system that helps bring about that competitive advantage.[32]

III. The Current System Promotes Important Principles of Federalism

The value of the principles of federalism embodied in our current system of tort law should not be overlooked. As Congressman Mike Box, of the Alabama House of Representatives, has testified:

> [t]he issues of proper compensation for injured persons and suitable protections for businesses are matters of social values and public policy that should be addressed at the state level, in the absence of a national economic crisis.* * * Arguments for uniform laws as a means of promoting competitiveness ignore the advantages of a decentralized and federal system of civil justice.* * * Remember why we developed as a federal nation * * * Our founding father recognized the importance of having governments responsive to the electorate. Broad powers were reserved to the states so they would serve as bulwarks of freedom, an antidote to an overpowerful national government.* * * S. 1400 [the identical predecessor to S. 640] is radical because it opens the door to substantially greater federal intrusions.[33]

These concerns were reiterated at this year's Subcommittee hearing by Delegate Bernard Cohen on behalf of the National Conference of State Legislatures. Delegate Cohen pointed out that Federal "preemption should not occur unless it could be proved that the variation in State laws is significantly impeding commerce among the States and unless the specific legislative response is the only way to resolve the conflict.* * * [T]his burden has not been met with respect to product liability laws." Delegate Cohen went on to note that, not only had the burden of proof not been met, but "the

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[31] Letter from Professor Nicholas Ashford to Senator Ernest Hollings, October 1, 1991, submitted for the record of the Consumer Subcommittee hearing on S. 640, September 19, 1991.

[32] Testimony of Professor Mark Hager, Assistant Professor of Law, Washington College of Law, American University, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 126.

[33] Testimony of Rep. Mike Box, Alabama House of Representatives, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, Statement at 1-3.

basic rationale for this bill, the underlying rationale for it, is fallacious." [34]

Professor Eisenberg from Cornell Law School also has raised these concerns, and pointed out the practical problem with Federal tort law that we believe should provoke serious concern.

> The changing nature of products liability law make me cautious about wishing for Congress to implement a single rule. For the rule Congress adopts had better be a good one, since it may preempt further experimentation and change by the states. I see no basis for believing that the rules embodied in S. 1400 [predecessor to S. 6401] are superior to the collection of rules embodied in various state laws and to the ability of the states to adopt the best rules of their sister states, as those rules evolve over time. The one thing we do know is that state product law does change. I worry that Congress may freeze the law with the wrong set of rules at a time when there is no clear reason to [do so].[35]

We have the same concern. We are constantly surprised that some are willing to take their chances with Congress setting the rules over the long haul. Such an effort would limit flexibility, and could eventually result in rules more oriented toward plaintiffs than those the states would craft. In any event, we only should tinker with the fundamental principles of federalism in the most extreme circumstances—a record such as we have on this issue is insufficient to take such action.

IV. The Current System Did Not Cause The Insurance "Crisis"

In past years, the cry for product liability law has been based on a "crisis" in the availability and price of insurance. That argument has become nonexistent, since virtually everyone agrees that insurance is now generally available and well-priced—we are in a "soft" market.[36] Even before that occurred, however, it was clear that the product liability system was not responsible for insurance availability problems.

The primary allegations concerning the existence and magnitude of this crisis have proved vastly exaggerated. In 1976, the Federal Government created a Federal Interagency Task Force on Product Liability (hereinafter the Task Force) to examine the problem. The Insurance Study commissioned by the Task Force found that, while insurance costs did increase in the mid-1970s, insurance premiums exceeded 1 percent of the total sales for only three industries.[37]

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[34] Testimony of Delegate Bernard Cohen, Virginia House of Delegates, Consumer Subcommittee Hearing on S. 640, September 12, 1991, transcript at 85–86; 87.

[35] Testimony of Professor Theodore Eisenberg, Professor of Law, Cornell University, in response to post hearing questions of Senator Rockefeller, from Consumer Subcommittee Hearing on S. 1400, April 5, 1990, at 2.

[36] *See* Testimony of J. Robert Hunter, President, National Insurance Consumers Organization, Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript at 133–4; testimony of Deborah Baller Vice President, American Insurance Association, Consumer Subcommittee Hearing on S. 1400, April 5, 1990.

[37] U.S. Department of Commerce, Interagency Task Force on Product Liability, Final Report VI-20 (1977) [hereinafter cited as Task Force Final Report].

By 1983, evidence indicated that product liability insurance costs had stabilized or decreased, and that the insurance crisis had disappeared. A 1983 Institute for Civil Justice study concluded not only that reports of a product liability crisis in the mid-1970s were greatly exaggerated, but that even the perception of a crisis had receded because it had become evident that product liability claims had not imposed unreasonable costs on most manufacturers.[38] Costs increased and availability decreased again in the mid-1980s.

The increases in product liability insurance costs were a result not of product liability but of the cyclical nature of the insurance industry and the industry's ratemaking practices. The Congressional Research Service (CRS) has described the repeating cycles of high and low premiums as an historical alternation between soft and hard insurance markets, and has discussed the management practices of the companies which contribute to this cycle. In a soft market, rates are adequate, and risk selection careful, and the industry generally performs well. New capital is attracted from a number of sources and capacity increases. Price cutting of premiums results when new sources of capacity begin to generate increased competition for available premium volume. Underwriting standards (the standards for deciding whether to insure a particular manufacturer) for risk selection diminish with increased competition, and insurers take on riskier business endeavors. According to CRS, this practice results in rising claims losses.

At the point that competition is severe and that losses are too high, insurers withdraw from the market and the capacity shrinks, resulting in a hard market. Availability and affordability problems ensue as the remaining insurers raise prices and tighten the underwriting standards. Eventually the market stabilizes, a soft market emerges, and the cycle begins again.[39]

Interest rates, which reached historic heights in the late 1970s, aggravated the cycle. Companies engaged in price wars in order to obtain a larger volume of premium income for investment.[40] Basically, companies were willing to accept lower premiums for certain insurance lines in order to encourage sales and obtain funds for investments.[41]

On February 19 and March 4, 1986, the Committee held hearings to conduct a more comprehensive examination of the availability and cost of liability insurance. Testimony was presented at hearings on the reasons for the insurance crisis. Witnesses noted that the insurance crisis has arisen during a period of falling interest rates, prior to which competing insurance companies had been underpricing their product in order to maximize cashflow and enhance investment income. When interest rates began to fall, companies were forced to increase premiums because investment

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[38] Rand Corporation, The Institute for Civil Justice, "Designing Safer Products: Corporate Responses to product Liability Law and Regulation 121" (1983) [hereinafter cited as Designing Safer Products].

[39] *See* Congressional Research Service, "Property-Casualty Insurance Market Operation", CRS Report No. 85-629E (March 20, 1985).

[40] *See* "A Rate War Rips Casualty Insurers," Business Week, December 8, 1980.

[41] Hearing on Product Liability before the Consumer Subcommittee, 99th Cong. 2d. Sess. (1986) (hereafter cited as 1986 Product Liability Hearing). (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Account Office) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).

income was no longer compensating for underwriting losses. The Committee report accompanying S. 2129, the Risk Retention Amendments of 1986, states that "[t]his practice of cashflow underwriting was linked directly to the current crisis." [42]

GAO testified in May 1986 before the Consumer Subcommittee that the underwriting cycle turned again and "is now moving in a positive direction." The property/casualty industry will enjoy "an expected net gain before taxes of more than $90 billion over the years 1986-90."

GAO also found a profitable industry over the last 10 years, stating that "the property/casualty companies have used a pricing strategy which sacrificed underwriting profit margins in order to generate cash for investment purposes. As a result of the strategy, the property/casualty industry has made between $52 and $79 billion in net gains over the last 10 years." [43]

The irony of the continuing debate over a Federal produce liability bill is that insurance costs were emphasized by the proponents as the reason for passage of a Federal product liability bill in the 96th and 97th Congresses when premiums were high, and were deemphasized as a reason for passage of product liability legislation during the 98th Congress when insurance premiums were reduced. In the 99th Congress, the proponents again pointed to the high premiums as a justification for a Federal bill, but these arguments have disappeared in the 101st and 102d Congresses.

V. Product Liability Is Not A Major Factor in The Competitiveness of U.S. Business

This year's stated reason for this legislation is that product liability inhibits the ability of U.S. business to compete in world markets and to market innovative products. The facts are to the contrary.

OTA has recently completed a study of the competitiveness of U.S. manufacturers.[44] The study concluded that American manufacturing clearly is being challenged by competitors, particularly from Japan, and that there is no single solution. However, the recommended policy options for Government activity to address this challenge did not include Federal product liability law. Rather, OTA listed as the four most important steps that the United States could take to improve competitiveness: (1) lower the cost of capital; (2) improve the quality of human resources through education and quality of workforce; (3) improve the diffusion of manufacturing technology to small- and medium-sized business; and (4) provide Government funding of risky but promising long-term research and development.[45]

Additionally, in 1987, the Conference Board surveyed risk managers of 232 major U.S. manufacturing, trade, and service corpora-

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[42] S. Rep. No. 294, 99th Cong., 2nd Sess. 4 (1986).

[43] 1986 Hearing on Product Liability, *supra* note 25 (Statement of Johnny C. Finch, Senior Associate Director, General Government Division General Account Office) (Testimony on file at Senate Committee on Commerce, Science, and Transportation).

[44] U.S. Congress, Office of Technology Assessment, "Making Things Better: Competing in Manufacturing," OTA-ITE-443 (Washington, D.C.: U.S. Government Printing Office, February 1990).

[45] Testimony of Dr. Julie Fox Gorte, Office of Technology Assessment, Consumer Subcommittee Hearing on S. 1400, April 5, 1990 at transcript pp. 61-2.

tions about the effect of product liability on their companies.[46] Risk managers are the corporate employees that have the greatest corporate responsibility for addressing product liability issues—40 percent, as compared to a 6-percent responsibility by Chief Executive Officers (CEOs).[47] Two-thirds of the risk managers said that product liability contributed 1 percent or less to the final prices of their products. For another 11 percent of the companies, the liability cost was only 2 to 3 percent of the final price.[48] Additionally, most of the companies surveyed said that the area in which product liability had most significantly altered management decision-making was in the quality of the products themselves.[49]

GAO made similar findings in a 1988 report on the issue.[50] GAO found that insurance costs represented a relatively small proportion of businesses' annual gross receipts—0.6 percent for large businesses, and about 1 percent for small businesses.[51]

The Institute for Civil Justice of the Rand Corp. concluded in 1983 that product liability costs in most cases were only a minute percentage of costs to business:

> It appears safe to conclude that for most large manufacturing firms, product liability costs—including the cost of defending litigation and certain product liability prevention activities—probably amount to much less than 1 percent of total sales revenue.[52]

Also, the Rand Corp. has found that only a small percentage of U.S. manufacturers are even involved in product liability litigation. In 1986, only 0.9 percent of all manufacturing concerns in the United States were defendants in product liability litigation.[53]

The only claims to the contrary regarding the competitiveness of business are based on self-serving anecdote or unsupported claims. For example, the Vice President's Council on Competitiveness has claimed that the cost of the tort system is crippling U.S. business, using various dollar amounts for the total cost of the system. Upon scrutiny, these dollar amounts are completely without factual basis.

The Vice President asserted that the "direct" costs of the tort system are $80 billion per year, and that indirect costs were considerably higher. The "authority" cited for that figure is Forbes magazine, which in turn cited no authority. The figure can be located in only one other place we have been able to uncover—Peter Huber's book, "Liability: The Legal Revolution and Its Consequences." However, as an analysis of this book for the Stanford Law Review points out, this number was simply lifted from a comment made by Robert Malott, Chairman of the Business Roundtable's product liability task force and CEO of the FMC Corporation, in the 1986

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[46] Weber, "Product Liability: The Corporate Response," The Conference Board, Report No. 893 (1987).
[47] *Id.* at v.
[48] *Id.* at 13.
[49] *Id.* at 2.
[50] U.S. General Accounting Office, "Liability Insurance: Effects of Recent 'Crisis' on Businesses and Other Organizations," GAO/HRD-88-64 (July 1988).
[51] *Id.* at 5.
[52] Designing Safer Products, supra, note 22 at 121.
[53] Dugworth, "Product Liability and the Business Sector: Litigation Trends in Federal Courts," *supra.* at 53-56.

issue of Chief Executive magazine. Mr. Malott was quoted as saying, "insurance liability costs industry about $80 billion per year" with no documentation for that remark.[54] These "authorities" speak for themselves about the extent to which we should rely on these estimates in deciding to overhaul the civil justice system.

The only other discordant note in the general agreement that product liability has a very small impact on business comes from a 1988 Conference Board survey of 500 chief executive officers of corporations, 42 percent of whom stated that product liability had a major impact on them.[55] Some components of the Conference Board apparently were dissatisfied with the results of their 1987 survey, cited above, which did not support their theory of product liability. So, they decided to ask different people, in hopes of a different result. This is virtually the only piece of information cited by the supporters of this legislation for the proposition that product liability affects competitiveness.[56]

However, as Prof. Theodore Eisenberg of Cornell Law School has stated with respect to this survey, "* * * the case for reducing defendant liability seemed rather weak. It depended in large part on a survey of CEOs in which they were asked whether products liability was a problem for their companies. The flaws in such a survey are so substantial and obvious that no self-respecting legislature should act on the basis of the results." [57] We could not have said it better ourselves. We cannot responsibly move forward on this legislation based on a self-serving survey of corporate executives, particularly when it is contrary to all other data. The data demonstrates that the actual impact of product liability on businesses' bottom line is very small.

What is truly troubling about this debate over competitiveness is not the effect of the tort system on business, but the total lack of reliable information on which this competitiveness claim is based. As Dr. Deborah Hensler of the Rand Corp. testified, "[p]roduct liability litigation has been a source of controversy and public policy debate for almost a decade in this institution. I think it is remarkable that we still lack very basic information about the extent and nature of that litigation and the costs of resolving claims." [58]

When the debate on this bill first began in this Congress, the supporters declared that the product liability system must be altered because of the changes taking place in the European Economic Community (EEC). It was argued that the EEC was moving toward a uniform product liability system, and the United States must do the same. It also was argued that other countries in the world had lower product liability costs than the United States, implying that this country should somehow emulate those other sys-

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[54] Hager, "Civil Compensation and Its Discontents: A Response to Huber," 42 Stanford L. Rev. 539, 547-550 (January 1990).

[55] McGuire, "The Impact of Product Liability," The Conference Board, Report No. 908 (1988).

[56] *See, e.g.*, Testimony of Wendell Wilkie, General Counsel, Department of Commerce, Consumer Subcommittee Hearing on S. 1400, February 22, 1990.

[57] Responses of Professor Theodore Eisenberg, Professor of Law, Cornell University, to post-hearing questions of Senator Rockefeller, April 10, 1990, response to question 1.

[58] Testimony of Dr. Deborah Hensler, Consumer Subcommittee, September 12, 1991, hearing, transcript at 106.

tems. However, like so many arguments on this issue, when the facts were examined, the argument disappeared.

The Council of the European Communities issued a directive in 1985 "concerning liability for defective products." [59] Despite the August 1, 1988, compliance deadline in the directive, only five member states—the United Kingdom, Italy, Greece, Luxembourg, and Denmark—had adopted the Directive as of March 15, 1990.[60] More significantly, the Directive by its terms does *not* preempt existing law in the various countries, but merely provides an additional cause of action in those countries in which remedies for harm already exist, and therefore is not likely to establish a more uniform system. As Prof. Lawrence Mann of Wayne State University School of Law testified, "[the Directive] is not in derogation of each member state's substantive tort law. And so, side by side, they will have a dual system operating." [61] Additionally, while the Directive establishes certain rules of law, it leaves many issues optional with the member states.[62]

Equally interesting, it is apparent that the EEC is moving toward a system of substantive product liability that is more consumer-oriented than that which is currently in place, and more like that in the United States. For example, its directive introduces the concept of strict liability for defective products,[63] expands the scope of potential defendants,[64] and institutes joint and several liability.[65] Since product liability is being expanded, insurance premiums are likely to go up, with an accompanying significant additional cost for producers in the EEC.[66]

Thus, the EEC Directive does not provide an incentive for changing U.S. product liability law. Rather, it is a recognition of the value of current U.S. law in protecting consumers and promoting safe products. As Wendell Wilkie, General Counsel of the Department of Commerce, has testified,* * * the protection [other countries] afford their consumers is so radically smaller than is the case in this country [that] the disparity in the costs associated between our system and theirs is inordinately great.* * *" [67] We do not believe we should sacrifice the greater degree of consumer protection we enjoy for some unsubstantiated hope of greater competitiveness.

It also has been argued that product liability costs are much higher in the United States than in the countries of some of our foreign competitors. However, a direct comparison of the costs of the tort systems in various countries, without more, is not valid because it ignores other types of compensation systems available in other countries. For example, in the Netherlands several social in-

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[59] 28 O.J. Eur. Comm. (No. L 210) 29 (1985) (hereafter cited as "Directive".).

[60] Letter of Robert C. Holland, Committee for Economic Development, to Senator Richard Bryan, Chairman, Consumer Subcommittee, dated March 15, 1990, in response to post-hearing questions at 1.

[61] *See* Directive, Article 13; Testimony of Professor Lawrence D. Mann, Wayne State College of Law, Consumer Subcommittee Hearing on S. 1400, February 22, 1990, transcript, p. 167.

[62] *See, e.g.* Dielmann, "The European Economic Community's Council Directive on Product Liability," *The International Lawyer*, Vol. 20, No. 4, 1391 at 1400 (1986).

[63] Directive, Article 1.

[64] Directive, Article 3. *See also* Theiffry, Doorn, and Lowe, "The Single European Market: A Practitioner's Guide to 1992," 7 B.C. Int'l & Comp. L. Rev. 357 at 383.

[65] Directive, Article 5. *See also*, Thieffry, Doorn and Lowe, *supra*, at 383.

[66] Dielmann, *supra*, at 1399.

[67] Testimony of Wendell Wilkie, General Counsel, Department of Commerce, at Consumer Subcommittee Hearing on S. 1400, February 22, 1990, transcript p. 30.

surance programs are available which may preempt the need for compensation through the litigation process—the ZW/Sick Statute; the ZFW/Sick Fund Law; the WAO/Workers Disability Act of 1967; the AAW/General Act on Disability of Work; and the AWBZ/General Act on Special Medical Costs. The ZW is funded by collecting 5 percent of employers' gross income and 1 percent of employees' gross income. An injured employee may receive up to 70 percent of earned wages for 1 year. AAW and WAO continue funding if further assistance is needed.[68]

Moreover, the tax burden on business in the various countries must be included in any calculus of the relative competitive status of business. Taxes on business are higher in virtually every advanced country than they are in the United States.[69]

Thus, while business' costs related directly to the tort system may be lower in other countries, the relevant comparison is between the overall cost of compensation, which is likely to be similar to that in the United States. The proof of the fact that U.S. laws do not unduly burden companies doing business here is that foreign businesses are increasingly trying to locate here. In fact, foreign direct investment in the United States has increased from $83 billion in 1980 to $530 billion in 1990.[70] They would not do that if the tort system were the crippling burden that has been suggested by the proponents of S. 640.

It is clear that the facts do not support this contention that the current product liability system puts American businesses at a competitive disadvantage. If we are going to legislate to assist American business, we should do it in a way that will be effective, and S. 640 will not be.

VI. S. 640 Will Not Reduce Product Liability Costs for Business

Even if we assume that product liability is a significant barrier to the ability of U.S. firms to compete in world markets, that barrier cannot be reduced by any legislation unless the legislation somehow reduces businesses' costs. The Committee received virtually unequivocal testimony that enactment of bills such as S. 640 will not have any such effect.

First, the insurance industry testified before the Committee about the identical predecessor to S. 640 in no uncertain terms that "* * * the bill is likely to have little or no beneficial impact on the frequency and severity of product liability claims.* * * [I]t is not likely to reduce insurance claim costs or improve the insurance market." [71]

No explanation has been offered, and none could logically be offered, for any way in which a bill could improve competitiveness if it does not reduce product liability claims or costs. As J. Robert Hunter, President of the National Insurance Consumer Organiza-

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[68] Mann and Rodrigues, "The European Directive on Products Liability: The Promise of Progress?" 18 Ga. J. Int'l & Comp. L. 391, 416.

[69] Testimony of John G. Wilkins, Director of Tax Policy for Economic Analysis, Coopers and Lybrand, before the House Committee on Ways and Means, hearing on factors affecting U.S. international competitiveness, July 18, 1991.

[70] Bureau of Economic Analysis, Department of Commerce (1991).

[71] Testimony of Deborah T. Ballen, Vice President for Policy Development and Research, American Insurance Association, at Consumer Subcommittee Hearing on S. 1400, April 5, 1990, transcript p. 110.

tion, testified, "[m]ake no mistake about it, if insurance costs and availability are not improved, competitiveness is not affected." [72]

Indeed, that the bill will not have its purported effects becomes clear when it actual impact is reviewed. For example, it is claimed that the bill will provide additional uniformity in product liability law nationwide. However, the bill only selectively preempts State law, leaving much of State law in place to be interpreted with the new Federal law. Additionally, it provides a Federal rule of law to be interpreted by both the State and the Federal courts, although the State courts are not bound by the decisions of Federal courts other than the Supreme Court.

As Professor Eisenberg testified,

> * * * for a period of time, at least, predictability may be reduced rather than increased. Each state will have to decide the scope of S. 1400's [the identical predecessor to S. 640] preemption and its relation to state tort law. The interaction between state and federal law in tort will be made more rather than less complex.* * * [U]niformity will not be quickly, if ever, achieved.* * *. [We] are at risk of having not just 55 jurisdictions but an additional dozen federal courts of appeals making products law. At least before enactment of S. 1400 the [federal] courts of appeals should have felt bound by state law. Until the Supreme Court speaks, it is not clear that state supreme courts would or should be bound by federal interpretations of S. 1400 as it interacts with the relevant state law.[73] With respect to punitive damages, S. 640 provides a standard of proof for punitive damages that is more restrictive than that in many states. However, punitive damages are not a significant factor in product liability cases. As Professor Eisenberg has stated, "[t]here is a widespread perception that punitive damages are awarded frequently and in great amounts. Yet every serious study of the area finds that punitive damage awards are relatively infrequent, that they usually are commensurate with the defendant's wrongdoing and that they bear a substantial relationship to the size of the compensatory awards.* * * [P]unitive damages are awarded in not more than one percent of filed cases.* * *" [74] The 1989 GAO Report also looked at punitive damages, and found that, on the few occasions when they were awarded, their amount had a high correlation with the amount of compensatory damages.[75]

In fact, regardless of the scope of the product liability legislation enacted, the record indicates that it will be ineffective in reducing product liability insurance costs. For example, Florida passed very

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[72] Testimony of J. Robert Hunter, President, National Insurance Consumer Organization, Consumer Subcommittee hearings on S. 1400, April 5, 1990, at 132.

[73] Testimony of Professor Theodore Eisenberg, Cornell Law School, Responses to post-hearing questions of Senator Rockefeller at 3. *See also Note, "Authority in State Court of Lower Federal Court Decisions on National Law," 48 Columbia L. Rev. 943, 954 (1948); Stern and Grossman, Supreme Court Practice (5th ed. 1978 at 280; Testa* v. *Katt,* 330 U.S. 386 (1947).

[74] Testimony of Professor Theodore Eisenberg, Responses to Post-hearing questions of Senator Rockefeller *supra,* at 4-6 and authorities cited therein.

[75] 1989 GAO Report, supra, at 27.

strong changes in its tort law in 1986, and also required the insurance industry to make rate filings indicating the effect of the changes on its rates. The Florida law eliminated joint and several liability, limited noneconomic damages to $450,000, and limited punitive damages. Nevertheless, when Aetna's rate filing came in, it listed the effect of each change on its rates as "zero." [76] There was no change in insurance costs, despite the dramatic changes in tort law, and we could expect none with enactment of S. 640.

When this is pointed out, the supporters of the bill often fall back on "transaction costs," and suggest that the bill may not reduce damages paid but will reduce transaction costs, or the costs of litigation such as attorneys' fees. Of course, if transaction costs were reduced, they should be reflected in reduced insurance costs, and insurance costs will not be reduced by this bill. In any event, the available evidence demonstrates that the bill will not reduce transaction costs, either.

GAO has stated unequivocally:

> [w]e believe that S. 1400 [the bill in the 101st Congress identical to S. 640] is unlikely to reduce transaction costs in product liability suits. For cases that are litigated, the procedural features of the tort system would not be changed by the bill. It is also not clear that the bill provides strong incentives for alternative dispute resolution, which could cut litigation costs. Moreover, the alternative dispute resolution mechanisms that may be used are left to the discretion of the states. If these mechanisms are not binding, then they may add to rather than substitute for litigation. If this happened, costs could actually increase.

GAO went on to note that transaction costs are largely a function of the length of litigation, and that delays caused by defendants are common. However, if a complete and accurate record is necessary to insure a fair outcome of the case, "lengthy litigation and its attendant costs might be justified." [77]

One justification offered for Federal product liability legislation in that legal fees paid to plaintiffs' attorneys are too high. However, this bill would not have any effect on attorneys fees. In any event, it is important to understand the value of the current system of compensation for plaintiffs' attorneys. Plaintiffs' lawyers who accept product liability cases work on a contingency fee basis. If they win the case they get a percentage of the case (which is usually about 30 percent); if they lose, they get nothing. This system allows injured plaintiffs who are not wealthy to obtain a lawyer. At the same time, the system acts as a deterrent to frivolous cases because attorneys are spending their own time and money in the case.

Figures from the Institute for Civil Justice state that plaintiffs receive approximately one-half of the cost of litigation.[78] Any prob-

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[76] Testimony of J. Robert Hunter, *supra.* transcript at 135.

[77] Testimony of Joseph F. Delfico, Director, Income Security Issues, General Accounting Office, Consumer Subcommittee Hearing on S. 1400, February 22, 1990 in response to post-hearing questions of Senator Bryan at 2.

[78] *Id.* at 2-3.

lem with the cost of the system is not with the cost of the attorney who is "investing" his or her own time and money to win a case. The problem is with the defense attorney who has an incentive to delay the case with dilatory motions, and thereby encourage severely injured plaintiffs to settle for less in order to get an expedited payment of the plaintiff's medical and other costs. Meanwhile, the company is making interest on money that would otherwise be in the hands of the prevailing plaintiff.

Moreover, defendants' attorneys are apparently better paid, on average, than plantiffs' attorneys. According to calculations derived from a 1977 survey conducted by the Insurance Services Office, for every dollar paid to claimants, insurers paid an average of an additional 42 cents in defense costs, while for every dollar awarded to a plaintiff, the plaintiff pays an average contingent fee of 33 cents out of that dollar.[79] Thus, in cases in which plaintiffs prevail, out of each $1.42 spent on litigation, half of that goes to attorneys' fees, with defendants' attorneys, on average, paid better than plaintiffs' attorneys. Of course, defendants' attorneys are paid regardless of the outcome of the case, while plaintiffs' attorneys are paid only if they win their case. Otherwise, they take a loss for the time and expenses they have incurred. Thus, existing transaction costs are not inappropriate, and in any event would not be reduced by this bill.

The facts lead to the conclusion that no reduction in costs will occur through changes in the current tort liability system, and thus that no competitive advantage for American business can result.

VII. The Product Liability System Does Not Stifle Innovation, but Can Encourage Innovations in Safety

Another theme sounded in support of the bill this year is that the current system deters innovation, and discourages new products from being brought to market. Of course, this effect is, by its nature, somewhat subjective and very difficult to examine. However, witnesses at the Consumer Subcommittee hearing examined the effects of the tort system on the chemical industry. In this case study, they noted that desirable innovation must mean safe innovation, and that if the tort system discourages unsafe innovation, that is valuable. They also found that, even in the chemical industry in which manufacturers pay a minuscule percentage of the costs of the injuries caused by their products, the tort system works to encourage the innovation of safer products.[80]

Business can, and often does, say it is discouraged from bringing innovative products to market, but they do not say what those products were, so the claim cannot be analyzed. However, the actual products that have been cited by witnesses in support of this claim subsequently had legitimate questions raised about their safety. In such cases, until such questions are resolved, we do not

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[79] Hearing before the Subcommittee on Trade, Productivity and Economic Growth of the House Joint Economic Committee, 99th Congress 2d Sess. (1986) (Statement of James S. Kakalik).

[80] Ashford and Stone, *supra.*, at 415, 417.

think we should presume that the product liability system has not worked properly to keep those products from the market.

Some examples of products cited as unfairly kept from the market by the system are set out below, together with the facts as they developed through the Committee's hearing process.

Monsanto Asbestos Substitute—Calcium sodium metaphosphate was cited by several supporters of S. 640 as a primary example of a safe product kept from the market by the product liability system. However, an Environmental Protection Agency (EPA) Status Report dated August 19, 1986, reviewed studies of this product submitted by Monsanto, and stated that "EPA believes that the evidence obtained from Monsanto's * * * study in rats offers reasonable support for the conclusion that calcium sodium metaphosphate fibers can cause cancer." (Report p. 9). Dr. Philip Landrigan, Chairman, Department of Community Medicine, Mt. Sinai Medical Center, reviewed the EPA and Monsanto documents, and stated: "I am extremely concerned about the potential carcinogenicity of sodium calcium metaphosphate." [81] Monstano's CEO, Richard Mahoney, subsequently wrote to the Committee stating that later tests of the fiber showed no evidence of health problems, that the first test was not done to determine the health risk to humans, and that the products was kept off the market solely because of concerns about "unwarranted litigation".[82] However, this letter does not explain why the first test would have been done if not to examine risks to human health.

Copper 7 IUD—Supporters of S. 640 claim that this product, although safe, was taken off the market because of unwarranted product liability suits. The court in *Kociemba* v. *Searle,* 707 F. Supp. 1517 (D. Minn. 1989), (settled w/out appeal), a Copper 7 case, stated that the plaintiff "presented evidence which would have allowed a reasonable jury to conclude that defendant knowingly placed millions of American women, especially [women who have not had children], at risk of serious infection, loss of fertility, and surgery for removal of internal organs" and that "responsibility for this conduct was shared throughout defendant's corporate hierarchy,and that the conduct continued for over ten years." Michael Ciresi, the lawyer who litigated many Copper 7 cases for plaintiffs, has written to the Committee stating that his firm spent millions of dollars on discovery of documents that Searle resisted through litigation to the Supreme Court. Cases litigated before completion of that discovery were not successful because of the lack of documentation. According to Mr. Ciresi, the documents ultimately obtained demonstrated that the company knew the product was dangerous to women who have never had children, but continued to market the product to those women. That action was the basis for punitive damages against the company.[83]

Sturm Ruger "Old Model" Single Action Revolver—This product was cited as one which was the victim of unreasonable verdicts

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[81] S. Rep. No. 476, 98th Cong., 2d Sess. 7 (1984) (citing Insurance Services Office, Product Liability Closed Claim Survey: A Technical Analysis of Survey Results at 11 (1977).

[82] Letter from Richard Mahoney to Senator Richard H. Bryan dated May 17, 1990, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

[83] Statement of Michael Ciresi, submitted for record of Consumer Subcommittee hearing on S. 1400, April 5, 1990.

based on injuries that were really due to plaintiff negligence. However, documents submitted at the Committee's May 10, 1990, hearing demonstrated that since 1962 Ruger had received reports of serious injuries and deaths resulting from accidental discharges of this gun. In 1968, the gun failed a test for accidental discharge performed by the Bureau of Alcohol, Tobacco and Firearms, and it subsequently failed Ruger's own tests. Ruger did not redesign the gun to add a transfer bar safety device until 1973, and estimated that between 1968 and 1973 more than 150,000 "old models" were sold. Bill Ruger, CEO of the company, testified during product liability litigation that no safety device was put on the gun because a revolver "is supposed to be designed in the traditional way." The Court in *Sturm Ruger* v. *Day*, 594 P.2d 38 (Alaska 1979) found Ruger liable for punitive damages for failure to add a safety device. According to testimony before the Committee, by 1989 about 230 product liability claims had been filed against Ruger for this defect, but the gun has never been recalled.[84]

Puritan-Bennett Anesthesia Gas Machines—This was cited by some witnesses as a product unjustly removed from the market by the product liability system. The machines were implicated in four deaths in 1983-84 hearings in the House Subcommittee on Oversight and Investigations, September 24, 1984, found that the company failed to notify the Food Drug Administration (FDA) of deaths that were caused by an overdose of anethesia due to swelling of "O" rings and resultant sticking of a valve. This problem was known in the 1970s, and reflected in an appendix to the 1979 voluntary standard for anesthesia machines. The FDA, testifying before the subcommittee in 1984, stated that the company "appears * * * [to have] failed to conduct adequate design review of certain critical components" including use of certain rubber-like materials in the presence of high concentrations of anesthetic gas. The company instituted a limited recall, and the FDA required the recall extended to all valves distributed through July 1984.[85]

CJ-5 and CJ-7 Jeeps—These vehicles were cited by hearing witnesses as examples of products subjected to unjust litigation. In response to this assertion, other witnesses said that these Jeeps are designed with narrow track width, a high center of gravity, and short length, and consequently have a propensity to roll over, even at low speeds. The Federal Trade Commission (FTC) in 1982 issued a complaint charging AMC with unfair and deceptive advertising because the Jeeps were portrayed as safe for reckless, off-road driving. The Insurance Institute for Highway Safety found these Jeeps to have a rollover risk between 12 and 19 times greater than regular passenger vehicles. Testimony indicated that AMC continually denied any problem, and continued to market the Jeeps until they were subjected to product liability suits. This model Jeep has now been taken off the market.[86]

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[84] Supplemental Statement of Linda Lipsen, submitted for record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

[85] Supplemental statement of Linda Lipsen, *supra*, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

[86] Supplemental Lipsen statement, *supra*, reprinted in record of Consumer Subcommittee Hearing on S. 1400, May 10, 1990.

Ortho Contraceptives—Witnesses at the Committee's hearings claimed these products were unfairly subjected to product liability actions, citing *Wooderson* v. *Ortho,* 681 P.2d 1038, cert. denied 105 S.Ct. 365 (1984). It was claimed that, in that case, the company was held liable for failure to warn even though the FDA had determined that the warning was not necessary. However, an examination of the Court's decision reveals that the Court held that there was no clear determination by the FDA as to whether such a warning was necessary, so that the defense was not valid. Ortho was held liable by the Court for punitive damages because it ignored substantial evidence that its product caused renal failure.

Taking all the evidence presented on both sides of these issues, we are not prepared to conclude that the current product liability system is not working properly to insure the safety of new products.

S. 640 IS SUBSTANTIVELY FLAWED

Enactment of S. 640 would amount to legislation which dramatically revises our current legal system without any serious factual predicate for such a change. In addition to this flaw as a matter of policy, it has numerous substantive legal problems. A few examples are set out below.

I. Non-uniform Selective Preemption

S. 640 is touted as a move toward a more uniform system of product liability law through Federal preemption of State law. It is important to look carefully at how this preemption would work, because it is not uniform, and, more significantly, it is one-way preemption. It covers only certain areas of State law and, in those areas it addresses, it revises the law only in the States that currently have law favorable to the plaintiffs. It would leave the State law intact if that State law currently favors defendants.

For example, section 303 of the bill purports to establish "Uniform Standards For Award of Punitive Damages." It establishes the burden of proof for punitive damages, and provides a defense to punitive damages for drugs or aircraft that have been approved by Federal authorities. However, by its terms, it applies to punitive damages only "if otherwise permitted by applicable law.* * *" Thus, in States which have, through State law, eliminated or limited punitive damages, this bill would not restore the availability of such damages. In some States, there would be no right to punitive damages; in some States they would be capped at a stated amount; and in others they would be available if the burden of proof in S. 640 is met. We do not call that uniformity in the law of punitive damages. If we truly wanted uniformity we would, at a minimum, restore punitive damages in the States that have limited them so that the law would be consistent nationwide.

Another example of this selective preemption of State law is in the area of joint and several liability for damages. Section 306 states that "the liability of each defendant for noneconomic damages shall be several only and shall not be joint." However, it does not restore the availability of full noneconomic damages in States in which such damages have been capped at a certain amount. It

does not restore joint and several liability for economic damages in States in which such liability has been limited by State law. So, again, we will not have uniform nationwide law on joint and several liability. We will have some States that have no joint and several liability, some that have joint and several liability only in certain circumstances, and some that follow the rule of S. 640.

Additionally, the bill provides a Federal rule of law to be interpreted by both the State and the Federal courts, although the State courts are not bound by the decisions of Federal courts other than the Supreme Court.

As Professor Eisenberg testified on the identical predecessor to S. 640,

> * * * for a period of time, at least, predictability may be reduced rather than increased. Each state will have to decide the scope of S. 1400's preemption and its relation to state tort law. The interaction between state and federal law in tort will be made more rather than less complex * * * [U]niformity will not be quickly, if ever, achieved. * * * [We] are at risk of having not just 55 jurisdictions but an additional dozen federal courts of appeals making products law. At least before enactment of S. 1400 the [federal] courts of appeals should have felt bound by state law. Until the Supreme Court speaks, it is not clear that state supreme courts would or should be bound by federal interpretations of S. 1400 as it interacts with the relevant state law.[87]

II. Defense Based On FDA Or FAA Approval

Section 303 creates an absolute defense to the award of punitive damages ("[p]unitive damages shall not be awarded") if a drug or medical device has received pre-market approval by the FDA (so long as that approval was not based on misrepresentations or bribes by the manufacturer to the FDA). Section 303 also creates an absolute defense against punitive damages for aircraft if the aircraft were subject to pre-market certification by the Federal Aviation Administration (FAA). In effect, this section makes the FDA and the FAA the first and last line of defense against manufacturer misconduct that is harmful to consumers. These agencies were never created to function in this manner, and there are numerous examples of their inability to afford this protection to consumers. Federal standards are minimum standards in most cases, and it is inappropriate to establish categorically this level as the only necessary level of safety that must be met in all cases.

A. Food and Drug Administration

The House Subcommittee on Human Resources and Intergovernmental Relations has devoted considerable time and resources, from 1983 to the present, conducting extensive investigations into the FDA's activities with respect to particular drugs. The Chair-

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[87] Testimony of Professor Theodore Eisenberg, Cornell Law School, Responses to post-hearing questions of Senator Rockefeller at 3. See also Note, "authority in State Court of Lower Federal Court Decisions on National Law," 48 Columbia L.Rev. 943, 954 (1948); Stern and Grossman, Supreme Court Practice (5th ed. 1978) at 280; *Testa* v. *Katt*, 330 U.S. 386 (1947).

man of that Subcommittee, Congressman Ted Weiss, has written to the Committee expressing serious concern about section 303 of S. 1400 [the identical predecessor to S. 640] stating: "I believe that any proposal that would deprive parties injured by drugs and devices of punitive damages relief currently provided by State law would diminish manufacturers' incentives to produce safer products, thereby putting consumers at greater risk." [88]

Congressman Weiss' letter contains numerous examples of drugs which were approved by the FDA despite the existence in FDA files of information about harmful effects of the drug. For example:

> The FDA failed to review all significant safety information *in its possession* concerning the new drug *Oraflex* prior to approving the drug for marketing. FDA had received several reports of Oraflex-associated liver and kidney disease during premarket clinical trials of the drug. Nevertheless, the agency approved labeling that * * * mentioned nothing about liver disease and * * * denied altogether any evidence of kidney disease * * *" [89] Only 3 months following FDA approval, the manufacturer withdrew Oraflex from the market after it was implicated in numerous reports of serious and sometimes fatal liver and kidney disease.[90]

Similarly, the FDA approved the new drug Versed, a sedative, in 1985, at doses that were substantially higher than those shown to be effective in published studies dating back to 1982, and without knowing how the drug was regulated in foreign countries. The FDA finally lowered the recommended dose in 1987 to levels that had been in effect in Europe for several years.[91]

The defense established by S. 640 also overlooks the fact that "important evidence regarding drug safety problems sometimes does not surface until after FDA approval." [92] Indeed, GAO recently issued a report on this issue which contained some alarming statistics. GAO found that:

> * * * of the 198 drugs approved by FDA between 1976 and 1985 for which data were available, 102 (or 51.5 percent) had serious post-approval risks, as evidenced by labeling changes or withdrawal from the market.* * * The serious postapproval risks are adverse reactions that could lead to hospitalization, increases in the length of hospitalization, severe or permanent disability, or death.[93]

These are only a few of the examples which amply demonstrate why we cannot responsibly rely only on the FDA to protect con-

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[88] Letter dated May 7, 1990, from Congressman Ted Weiss, Chairman, Subcommittee on Human Resources and Intergovernmental Relations of the Committee on Government Operations, to Senator Ernest F. Hollings, Chairman Committee on Commerce, Science, and Transportation, at 1. Letter available in Consumer Subcommittee files.

[89] Weiss letter, *supra*, at 2 (emphasis in original). *See also* H.R. Rep. No. 98-511, "Deficiencies in FDA's Regulation of the New Drug 'Oraflex'," 98th Cong., 1st Sess. (1983), at 4-6.

[90] Weiss letter, *supra*, at 2. *See also* H.R. Rep. No. 98-511, *supra*, at 8-13.

[91] Weiss letter, *supra*, at 2. *See also*, H.R. Rep. 100-1086, "FDA's Deficient Regulation of the New Drug Versed," 100th Cong., 2d Sess. (1988), at 10-27.

[92] Weiss letter, *supra*, at 2.

[93] U.S. General Accounting Office, "FDA Drug Review: Postapproval Risks 1976-85," GAO/PEMD-90-15 (April 1990) at 3.

sumers from all the dangers of drugs. It is argued that S. 640 only protects manufacturers from the award of *punitive* damages, and that this is reasonable once they have achieved FDA approval for their product. It is certainly true that, in many cases in which defective drugs are approved by the FDA, the manufacturer should not be held liable for punitive damages. Indeed, awards of punitive damages in product liability cases are exceedingly rare.[94] However, problems with drugs that have achieved FDA approval are prevalent, and there are documented cases in which the manufacturers' misconduct was a primary factor in the continued marketing of such products.[95]

Given these facts, it is unreasonable to conclude, as S. 640 does, that there could never be circumstances in which punitive damages should not be awarded for pharmaceutical manufacturers' misconduct. The proper course is to leave that decision where it is now—with the jury and the court.

B. FAA

Similarly, it would be inappropriate to eliminate any potential for punitive damages for aircraft based on FAA approval of the aircraft design. The possibility of punitive damages provides an important deterrent which helps insure that manufacturers police themselves, and do not rely on the FAA to uncover any defects. Moreover, the FAA is required to set only minimum safety standards "in the interest of safety". *See* 49 U.S.C. 1423(a)(1) . The FAA also has a duty "to promote air commerce." 49 U.S.C. 1346. Thus, the FAA arguably may balance safety standards against the interests of commerce. Moreover, compliance with FAA standards indicates no more than that the manufacturer performed the minimum required. *See Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (D. Or. 1978).

Additionally, there are real questions about the effectiveness of the FAA's safety inspection management system. GAO, in a report released on November 13, 1989, is extremely critical of this system, noting that: "[i]nadequate oversight of the inspection program resulted in (1) FAA headquarters management's being upward that its inspection policies were not always followed by local FAA staff and (2) inaccurate reporting to Congress of FAA achievements." [96]

The effect of this inadequate inspection system on the defects in aircraft was recently recognized by the Chairman of Cessna Aircraft who stated that: "[W]ith tougher airworthiness requirements implemented aggressively by the FAA, and with type-specific flight standards, I believe it is realistic to reduce the level of accidents by at least 50 percent." [97] If even the aircraft manufacturers believe

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[94] Landes and Posner, "New Light on Punitive Damages," (October 1986). *See also*, Public Citizen's Congress Watch, et al., "The 'FDA Excuse' " (May 1990) at 3; Notes 54 and 55, *supra*.

[95] For example, the evidence is strong that the Copper 7 IUD, which was approved by the FDA, was known to the manufacturer to pose dangers for women who had not had children but continued to be marketed by the manufacturer to such women for many years. The Court reviewing this conduct upheld the award of punitive damages. *See, Kociemba* v. *Searle*, 707 F. Supp. 1517 (D. Minn. 1989) (settled without appeal); "The 'FDA Excuse' ", *supra, at 1-2; Letter of Michael Ciresi, supra.*

[96] U.S. General Accounting Office, "FAA's Inspection Management System," GAO/RCED 90-36 (November 1989) at 8.

[97] AOPA (Aircraft Owners and Pilots Association) "Pilot" magazine, "G.A. Manufacturers Propose New inspections," (June 1989).

there is room for a 50-percent improvement from the FAA, it would not be appropriate to leave the FAA as the only line of defense for the safety of the flying public. We must require continued maximum vigilance from the manufacturers themselves.

III. Statute of Repose

Section 304(b) of the bill would bar liability for any harm caused by a capital good more than 25 years after its original delivery. This would shield from liability a significant number of products in use. Howard Fark, a member of the Board of Directors of the National Machine Tool Builders Association, testified that over 50 percent of the claims filed against machine tool builders involve machines over 25 years old.[98]

It is argued that, if machines are defective, the defects will show up before the expiration of a 25-year period, so that manufacturers typically should not be liable for such products after that time. We have no reason to dispute that, but, by the same token, there has been no demonstration that there could never be a defective 26-year-old product. As long as that possibility exists, it is appropriate to leave the responsibility to decide who should be liable for harm from a product where it now exists in most States—with the jury and the court.

It is also often suggested that this will be a proplaintiff change in the law, since some States have statutes of repose shorter than 25 years. What those suggestions do not say is that only 17 States, a small minority, has any statute of repose.[99] This is not a proplaintiff change, because it would enact statutes of repose in the vast majority of States that currently have chosen not to have such bars to filing suit.

IV. Worker's Compensation Offset

Section 305 purports to establish unform standards for offset of worker's compensation. Among other things, it would do away with the traditional lien on awards of damages from third-party manufacturers that is currently available to employers who have paid workers' compensation payments for an injury. This provision is opposed, and understandably so, by the National Association of Stevedores, the Association of General Contractors, and the Shipbuilders Council of America, among others, who point out that it shifts these costs, without justification, from manufacturers to the industry that uses machinery and equipment.[100]

It has been recognized that the workers' compensation insurance systems in many states are having difficulty meeting their finan-

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[98] Testimony of Howard Fark, Vice President, Minster Machine Company, Response to Post-Hearing Questions of Senator Rockefeller at question 2, Consumer Subcommittee Hearing on S. 1400, February 22, 1990.

[99] Only 17 states currently have valid statutes of repose in effect. In those states, the statutes of repose are typically shorter than 25 years. However, the majority of states have not enacted such statutes and, in, some states, the statutes have been struck down as conflicting with state constitutional rights to access to the courts or equal protection. *See, e.g., Danguard* v. *Baltic Cooperative Building Supply Association*, 349 N.W. 2d 419 (S.D. 1984); *Heath* v. *Sears, Roebuck & Co.*, 464 A. 2d 288 (N.H. 1983).

[100] Testimony of Thomas D. Wilcox, Executive Director and General Counsel, National Association of Stevedores, Consumer Subcommittee Hearing on S. 1400, May 10, 1990, statement at 2.

cial obligations.[101] The cost-shifting required by S. 640 only will exacerbate that problem for the no-fault workers' compensation system in the vain hope of reducing the costs of the tort system for third-party manufacturers.

This cost-shifting also will affect the federal government in its position as employer, because it will be unable to obtain reimbursement from liable third parties for payments made to workers under the Federal Employees Compensation Act and the Longshoremen and Harbor Workers' Compensation Act.[102] The Congressional Budget Office has stated that, in a 2-year period, the Government recovered $9 million in such situations from liens against liable third parties. At least a sizable portion of that money will be lost to the Government under this bill.

V. Alternative Dispute Resolution

Section 202 purports to encourage parties to use alternative mechanisms of resolving cases prior to going to court. That may sound good, but in the heavy-handed way that it is written, this provision really discourages parties from exercising their constitutional right to a trial by jury. It creates a presumption that if a party refuses to pursue alternatives to trial, exercises his or her right to trial by jury, and loses his or her case, that party has not acted in good faith and may be required to pay the litigation costs of the other party.

As Consumer Subcommittee testimony from the South Carolina Jury Trial Foundation pointed out, we must be particularly vigilant about inroads into the constitutional trial by jury.

> From its inception as a safeguard of individual liberty in the Magna Carta, those who would wield the tools of tyranny have tried to undermine or destroy the institution of trial by jury. King John attempted to revoke the Magna Carta. Henry VIII and Elizabeth I would have abolished it if they could. Charles I circumvented jury trials through the Star Chamber.* * * George III denied the right of trial by jury to colonists through expansion of the jurisdiction of admiralty courts and the state of Rhode Island attempted to deny the right altogether in suits under the State Bank Act.[103]

As the representative of the South Carolina Jury Trial Foundation further pointed out, "[c]an I guarantee my intimidated client that if he declines a defendant's offer to arbitrate and exercises his constitutional right to a civil jury trial he will not wind up having to pay the attorney's fees of a small army of Philadelphia lawyers?" [104] Section 202 of S. 640 creates too great a risk that, by exercising the right to a jury trial, an injured party can be punished for acting "unreasonably" or in "bad faith" and thereby required to pay defendants' costs.[105] This same party could run the same

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[101] *Id.* at 2-3.
[102] *Id.* at 1-2.
[103] Testimony of J. Kendell Few at Consumer Subcommittee hearing on S. 640, September 19, 1991, statement at 21-22.
[104] *Id.* at 23-4.
[105] *Id.* at 6.

risks under section 201 of S. 640, which creates "incentives" for accepting settlement proposals, by requiring the payment of costs if the case is litigated and the claimant receives less than the settlement offer.[106] These provisions create a chilling effect on the exercise of the Seventh Amendment right to trial by jury which is unacceptable in our system of government.[107]

As testimony at the Consumer Subcommittee from the South Carolina Jury Trial Foundation demonstrated, an injured consumer, often without resources, can hardly risk the possibility that he or she may have to pay the legal fees of a corporate defendant in order to allow his or her case to be heard by a jury. By requiring plaintiffs to run that risk or forgo their right to trial, S. 640 runs counter to the Seventh Amendment of the Constitution." [108]

That these provisions have a chilling effect on the exercise of plaintiffs' constitutional rights is made even more clear by sections 102(5) and 103 of S. 640. In those sections, the authors of the bill have excepted from its provisions all commercial cases. Thus, in cases in which businesses will sue other businesses, they will not face these barriers to exercise their Seventh Amendment rights. However, they would require injured consumers to accept burdens that they themselves do not want to bear in their own litigation. Not only is this provision counter to the Constitution, but it creates a double standard—one for consumers as plaintiffs and one for businesses as plaintiffs—and, needless to say, the consumer suffers.

As the South Carolina Jury Trial Foundation testified before the Committee, "[i]t has been an elemental concept of constitutional law * * * that any infringement of the Bill of Rights, however slight, is a violation of the clearly written constitutional rights of every American citizen." [109] As Winston Churchill said in 1956, "[t]he jury system has come to stand for all we mean by English justice. The scrutiny of 12 honest jurors provides defendant and plaintiff alike a safeguard from arbitrary perversion of the law." [110]

The proponents of this bill attempt to justify it as a "national necessity," claiming that manufacturers cannot compete in a world economy without these infringements on the Constitution. As testimony before the Committee pointed out, that was also the primary excuse for the exercise of arbitrary power in the Star Chamber, and was the reason why Germany scrapped its jury system in 1924. As Hudson's Treatise on the Star Chamber put it, "if those of the poorer sort" bring suits, there is a presumption that they are "clamorous", and then the poor must pay the rich man's costs "if they prove not the bill." [111] That attitude is found in S. 640 as well. Surely this type of infringement upon the Seventh Amendment is not necessary in order to allow our industry to compete in

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[106] *Id.* at 5–6.

[107] *Id.* at 1.

[108] Testimony of J. Kendell Few, Consumer Subcommittee Hearing on S. 640, September 19, 1991, transcript at 98–99.

[109] Few testimony, *supra.*, statement at 10.

[110] *Id.* at 19.

[111] *Id.* at 33, citing Hudson, "A Treatise on the Court of Star Chamber," (1792) reprinted by Legal Classics Library 1986, at 130.

world markets. Such a sacrifice on the altar of competitiveness must not be made.

CONCLUSION

A Committee of the United States Senate should not report legislation to federalize product liability tort law without any comprehensive data to demonstrate (1) that such legislation is necessary, and (2) that such legislation will work.

Do we know what we are getting into? Based on the scant evidence provided by the proponents of this legislation, the answer to that question is: "obviously not." We do know that enactment of this legislation would not affect insurance premiums of this legislation would not affect insurance premiums or businesses' product liability costs, S. 640 will not make American businesses more competitive, and may actually undermine current levels of product safety. We are not going to solve the problems of U.S. business with legislation of this type, and in fact, we run the risk of harming the consumer. The bill should be rejected.

MINORITY VIEWS OF SENATOR FORD

S. 640 should be rejected because it would unjustifiably intrude upon settled State laws and significantly burden employers—particularly small businesses. The proponents of S. 640 argue that it is a "procompetitiveness" bill uniformly backed by the business community and opposed only by consumer groups and trial lawyers. However, we have seen significant opposition to the bill within the business community and particularly among small employers.

The premise of the bill is that Congress knows better than the States. The bill selects areas of product liability law for preemption without adequate consideration of the harm and confusion that will be caused by undoing settled law. It is for this reason that the Conference of Chief Justices and the National Conference of State Legislatures oppose the legislation. Many small businesses oppose it because it disturbs settled law that protects their rights under the workers' compensation and tort system.

S. 640 would repeal basic aspects of the workers' compensation systems of a majority of States, including Kentucky. A majority of States have long protected employers—and especially small businesses—from excessive workers' compensation costs by providing rights of subrogation. A worker injured by a defective product is entitled to fixed benefits from his or her employer, regardless of the employer's fault. The injured worker may, however, have a cause of action against a responsible third-party manufacturer. Under majority State law, this right becomes the right of the employer or insurance carrier that has paid the benefits. They can, therefore, recover at least a portion of the workers' compensation they have paid from the manufacturer whose defective product caused the damages to begin with.

These States have made the decision that their employers—particularly small businesses—should not bear the overwhelming burden of product-related workplace accidents. However, by taking away subrogation rights, S. 640 shifts all of these costs back to the employer. Under the bill, the employer cannot recover compensation paid even if that employer is only 1 percent at fault for a workplace injury and a third-party manufacturer is 99 percent at fault. The responsible third party would be liable *only* for the damages in excess of the workers' compensation award any time an employer fails to hire a lawyer, come into court, and prove that the manufacturer was no less than 100 percent at fault.

For many businesses the assertion of subrogation rights against the manufacturer of a defective product is an important safeguard against excessive workers' compensation costs. This loss of subrogation rights would be especially burdensome for small businesses whose main business is not the manufacturing of products, and self-insurers who cannot easily spread additional workers' compensation costs. Even without the increased burdens of S. 640, these

businesses are struggling with the excessive costs of providing workers' compensation coverage.

S. 640 is particularly troubling in Kentucky because of Kentucky's State workers' compensation fund scheme. Kentucky has created a fund that will pay workers' compensation claims when employers are unable to do so. This fund is financed by tax revenues. S. 640 not only clearly takes away the subrogation rights of Kentucky employers and their insurance carriers, but it also appears to eliminate the similar rights of the State financed fund. If this is true, S. 640 would burden the financial strength of this fund and could lead to the prospect of increased taxes to maintain its current viability.

I object to any characteristics of S. 640 being a bill that will make American business more competitive. There is a significant segment of the business community opposed to S. 640 because the bill would result in increased costs on many businesses, especially small employers. In the case of Kentucky, S. 640 might result in further burdens on the State budget and the prospect of increased taxes.

We should not be in such a hurry to enact a law that will unsettle State law and inadvertently and unnecessarily burden our nation's employers, particularly entrepreneurs and small businesses.

MINORITY VIEWS OF SENATOR BREAUX

I oppose S. 640, the so-called Product Liability Fairness Act of 1991. I believe that this bill would be more properly termed the "Big Government Act of 1991" because of the way the bill tramples State law and State rights. The supporters of this bill apparently believe that when it comes to product liability laws, Washington knows better than the States, and Congress should make all the decisions. The reasoning that we, the Congress, know better than the States seems quite misplaced, considering especially that the States have been handling this area of the law for many, many years. I further find it ironic that the very same people who are supporting this intrusion into State rights and this interference with private business are the very same people who, when it comes to issues such as parental leave, are the first to argue that Washington should not interfere with State law or with the private sector.

S. 640 is further ill-advised because there is no evidence that it will accomplish the admirable goal of lowering insurance rates. In fact, many insurance companies have said to us that they cannot guarantee that they will lower their rates if this bill is passed. Some insurance companies, further, have opposed the legislation. We have not even seen credible evidence on the fundamental issue that existing product liability laws have even contributed to increased insurance rates. I find it somehow hard to believe that insurance rates will come down just because Washington takes over the law of product liability.

I am further unconvinced by Secretary Mosbacher's argument that this bill will make America "more competitive." Again, I find it hard to believe that having Washington take over will make America "more competitive." Furthermore, this argument makes no sense even on its own terms since, when an American company sells a product in a foreign country, that American company is governed by the product liability laws of that country. Similarly, when a foreign company sells a product in this country they are governed by our product liability laws. There are simply no competitive advantages of one over the other. Therefore, the so-called competitiveness argument in favor of Washington taking over this area from the States and from the private sector is unpersuasive.

I am also concerned about the precedent that we are setting by this bill. If Congress preempts States and the private sector on product liability, are we next going to preempt all other State tort laws? Are we going to preempt even the criminal laws of the States? Under the McCarran-Ferguson law, insurance is an area handled by the States. Are the supporters of this bill saying that we are going to overturn McCarran-Ferguson and have Congress decide insurance rates and how insurance policies ought to be written in each of the 50 States? Again, we should reject the concept that Washington knows best.

Additionally, and perhaps most egregiously, S. 640 may prove particularly harmful to small business employers. Section 305 of the bill, known as the Workers' Compensation Offset provision, does not seem to directly involve product liability at all. But again, this section involves complete preemption of settled majority State law. In the majority of States, including Louisiana, employers who pay compensation to injured employees are given rights of subrogation so that they may recover the amount of compensation they have paid when a third-party manufacturer is responsible for the injury. Section 305 of S. 640 would, for reasons not ever explained, shift all of these costs back to the employer. Needless to say, this would be burdensome for any employer, but it would be particularly burdensome for small businesses that are less able to spread these additional costs. Employers are already faced with dramatically increasing workers' compensation costs, partly because of the soaring costs of medical care, and to now add another burden on top of those costs seems ill-advised. I believe that the Congress should not do anything to make it more difficult for small businesses to survive, particularly given the difficult economic times that we are in.

We simply do not have enough information on the possible effects of S. 640, or whether any legislation in this area is needed at all. I believe that we should get more information on how this bill might effect insurance rates, and what impact the bill would have on employers, particularly small businesses. It seems that we have not done our homework. While I believe this legislation is ill-advised on its face, there is also little question that we have not taken the time to gather the necessary information before reporting this bill to the full Senate. I urge my colleagues to vote against S. 640.

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